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IN THE

Supreme Court of the United States

October Term, 1973

No. .....

73-55

RALPH WILLIAMS FORD, a California corporation,

Petitioner,

vs.

CALIFORNIA DEPARTMENT OF MOTOR VEHICLES and CALIFORNIA NEW CAR DEALERS POLICY AND APPEALS BOARD,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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RALPH WILLIAMS FORD, a California corporation,
Petitioner,

vs.

CALIFORNIA DEPARTMENT OF MOTOR VEHICLES and CALIFORNIA NEW CAR DEALERS POLICY AND APPEALS BOARD,
Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Petitioner Ralph Williams Ford, Inc., a California corporation, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Court of Appeal of the State of California, Second Appellate District, filed on February 9, 1973.

Opinion Below.

The Opinion of the Court of Appeal appears in 30 Cal.App.3d 494, 106 Cal. Rptr. 340. (A copy of said Opinion appears as Appendix A hereto.)

Jurisdiction.

The Opinion and Judgment of the Court of Appeal was entered on February 9, 1973. A timely Petition for

Hearing in the California Supreme Court was denied on April 4, 1973, and this Petition for Certiorari is filed within ninety days of that date. (A copy of the notice of denial of hearing appears as Appendix B hereto.)

The jurisdiction of this Court is invoked under Title 28, United States Code, §1257(3).

Questions Presented.

In an administrative disciplinary proceeding, Respondents, the California Department of Motor Vehicles (Department) and the New Car Dealers Policy and Appeals Board (Board) disciplined Petitioner, a licensed automobile dealer, and imposed a severe penalty, said penalty being based in whole or in major part upon "possible" or "potential" offenses committed by Petitioner which were not included in the Accusation and of which Petitioner was not given prior notice.

The most serious offense upon which the penalty was based was that Petitioner's accounting procedures and records were inadequate to dispel Respondents' concern that Petitioner might have failed to refund substantial sums of money to certain of its customers. There was no charge concerning Petitioner's accounting procedures, and no charge, proof or finding that Petitioner failed to refund said sums.

1. The first question presented is whether the due process clause of the United States Constitution is violated when, in an administrative disciplinary proceeding, an administrative agency penalizes its licensee for purported offenses which were not included in the charges or any amendment thereto and, therefore, of which the licensee was not given prior notice.

2. The second question presented is whether the due process clause of the Fourteenth Amendment to the United States Constitution is violated when, in an administrative disciplinary proceeding, an administrative agency penalizes its licensee on the basis of "other possible" or "other potential"[1] violations (*i.e.*, possible offenses or violations which were neither charged, proved, nor found to be true, but which the licensee failed to satisfy the agency did not occur.

Constitutional and Statutory Provisions Involved.

The constitutional provision involved is the due process clause of the Fourteenth Amendment to the United States Constitution (U.S. Constitution, Amendment XIV, §1).

The statutory provisions involved are California Vehicle Code §4455 (Appendix C) and §11713(g) (Appendix D).

Statement of the Case.

1. The Accusation—Notice of Charges.

The California Department of Motor Vehicles (the Department) filed an Accusation (Appendix E) against Petitioner, an automobile dealer duly licensed by the Department, charging, *inter alia*:[2]

4. That Petitioner was guilty of four violations of Vehicle Code §4455 for failing to transmit documents of title and fees to the Department within twenty days

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[1] These terms appear in the Court of Appeal Opinion at p. A-4 and A-7.

[2] So far as pertinent here, other charges in the Accusation were determined favorably to Petitioner, were not considered in the determination of penalty, and are therefore not relevant.

after sale, in violation of §4456 (Appendix E, Paragraph VIII, p. E-3 to E-4).

b. That on nine occasions Petitioner charged registration fees in excess of the fees due the State in violation of Vehicle Code §11713(g). Said nine violations totalled $103.00 (Appendix E, Paragraph X, p. E-4).

2. The Administrative Hearing.

The Accusation did not include any charges of (a) additional violations of §4456 or of §11713(g); (b) failure to repay refunds; (c) inadequate accounting procedures; (d) or failure to account for fiduciary moneys. Nevertheless, during the hearing, the Hearing Officer who conducted the hearing on behalf of the Department repeatedly demanded that Petitioner produce evidence concerning its refunding and accounting procedures for all registration fee overcharges in the mistaken belief that failure to refund overcharges was contained in the Accusation [Administrative Transcript (A.T.) p. 540, line 27 to p. 541, line 3; p. 541, lines 7-15; p. 544, lines 13-20; p. 547, lines 9-20; p. 547, line 26 to p. 548, line 4; p. 649, lines 11-13; p. 737, line 16 to p. 540, line 12; p. 742, lines 9-15; p. 759, lines 10-27; p. 770, line 20 to p. 771, line 22; p. 772, line 12 to p. 776, line 3; p. 800, lines 18-26; p. 805, lines 21-26; p. 808, line 7 to p. 809, line 28; p. 821, lines 6-28; p. 833, lines 22-24; p. 835, line 22 to p. 836, line 1]. By way of illustration, the following statements by the Hearing officer are quoted from the Transcript of the Administrative Hearing:

> "HEARING OFFICER: . . . I would like to know what audits have been made to determine whether the refunds have been made. I'm quite concerned with dealers collecting money and ap-

parently very slow in refunding it. And I'd like to know where the money is from the time it was collected until Motor Vehicles is paid and the refund is made: what account did it go into? What audit has been made of that account? We know of one account where undercharges are charged off. I'm curious if overcharges go into that account to offset the losses." [A.T. p. 541, lines 7-15].

Later, when Petitioner's counsel complained that it was difficult to produce all the records requested on short notice and that "This came up last night." the Hearing Officer replied:

> "HEARING OFFICER: Came up last night? The accusation has been pending for months. The accusation contains allegations of failure to refund overcharges. I see nothing difficult or new." [A.T. p. 737, lines 16-27.][3]

Petitioner on several occasions objected that the information demanded by the Hearing Officer was being brought up on short notice, could not be anticipated, and went beyond the scope of the Accusation [A.T. p. 737, lines 19-24; p. 738, line 17 to p. 739, line 7; p. 833, lines 25-28; p. 834, lines 6-9].

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[3]As noted above, the accusation did not allege failure to refund; however, we further note that the Department, as part of its case in chief, introduced affidavits which proved not only the nine overcharges constituting violations of Vehicle Code §11713(g), but also that in eight of the nine cases the refunds had not yet been paid as of the date the affidavits were prepared. Where the affiant was available for cross-examination, Petitioner immediately established that the refunds had been paid (Administrative Hearing, Exhibits 4, 8, 12, 14, 16, 17, 18, 22 and 23; A.T. p. 40, lines 20-24; p. 86, lines 7-9; p. 113, lines 17-22; p. 141, lines 3-6; p. 155, lines 14-19; p. 157, lines 9-12; p. 235, lines 4-6).

3. The Department's Decision.

Petitioner was found guilty of three of the four charged violations of Vehicle Code §4456 and of all nine of the charged violations of Vehicle Code §11713 (g), which were not contested, both Code violations being subject to mitigating circumstances indicating that the violations were neither willful nor negligent. (A copy of the Department's Decision appears as Appendix F, see Paragraph VIII, p. F-5; Paragraph X, p. F-5; and Paragraph XI, subparagraphs 2 and 3(a), pp. F-6 and F-7).

In addition, however, the Department made other findings adverse to Petitioner concerning matters which were not included in the Accusation. After describing Petitioner's procedures for refunding registration fee overcharges, the Department found:

a. That Petitioner's accounting procedures and records were inadequate to verify that the refunds were actually made (Appendix F, Paragraph XI, 3(b), (c) and (d), pp. F-8 to F-9).

b. That moneys paid by customers for estimated registration fees were fiduciary moneys requiring "the highest degree of accountability. Respondent did not meet this requirement. In 1969, Respondent modified its accounting procedure as to the accountability of fiduciary moneys, but the evidence did not establish how effective that such modification may be." (Appendix F, Paragraph XI, 3(e), p. F-9).

c. That at the end of the 1968 accounting period, the account to which Petitioner credited refunds of overcharges had a credit balance of $16,570.03 (Appendix F, Paragraph XI, 3(f), p. F-9).[4]

[4]While not germaine to the issue presented herein, we note for the record that this finding is factually incorrect. In fact, the

d. That, concerning the nine violations charged, with one exception, Petitioner did not refund the overcharges until after the Accusation was filed (Appendix F, Paragraph XI, 3(g), p. F-9).

The Department's Decision expressly recites that the foregoing matters, none of which was included in the Accusation, were considered in connection with the penalty imposed (Appendix F, Paragraph V, p. F-10). The Board thereupon revoked Petitioner's license, revocation being stayed subject to a three-year probation period and a ten-day suspension (Appendix F, pp. F-10 to F-12).[5]

4. The Appeals Board's Final Order.

Petitioner appealed to Respondent New Car Dealers Policy and Appeals Board (the Board) [C.T. pp. 25-29]. So far as pertinent here, the Board made the following rulings concerning matters outside the scope of the Accusation (the Board's Final Order appears as Appendix G):

a. The Board affirmed and expressed serious concern about the findings of the Department pertaining to Petitioner's accounting procedures, the handling of fiduciary moneys, and late payment of refunds (Appen-

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account referred to had a substantial deficit balance; no inference could be drawn from said account of failure to pay refunds; and the only evidence on this point was to the effect that all refunds had been paid [See discussion and transcript citations in Petitioner's trial brief, C.T. p. 152, line 4, to p. 156, line 7].

[5]Subsequently, in the Trial Court, Petitioner offered to prove that a ten-day suspension would result in a minimum out-of-pocket loss of $100,000, loss of sales of approximately $1,000,000, and severe damages to Petitioner's credit standing and reputation with the public [Clerk's Transcript [C.T.] of trial court proceedings, pp. 213-216; Reporter's Transcript of February 3, 1971 hearing in the trial court, p. 4, line 23 to p. 5, line 9; p. 7, lines 12-22].

dix G, Paragraph IV, pp. G-16 to G-25). More specifically, the Board stated that Petitioner "failed to show at the administrative hearing that it made the appropriate refunds with respect to the credit figure $16,-507.03 [sic] . . .," (p. G-23)[6] a matter outside the scope of the Accusation.

b. Next, the Board found that, in addition to the three violations of Vehicle Code §4456 as charged and found by the Department, Petitioner was averaging seventeen violations of §4456 per month during a six-month period covered by the investigation and that Petitioner's President, by way of mitigation, had indicated that sixteen to twenty violations per month was considered excellent (Appendix G, Paragraph III, p. G-13).

5. The Superior Court Trial Proceedings, Findings of Fact and Conclusions of Law, and Judgment.

Petitioner filed a Petition for Writ of Administrative Mandamus in the Superior Court of the State of California in and for the County of Los Angeles seeking to set aside Respondent Board's Final Order [C.T. pp. 1-3]. The constitutional issue presented herein was raised in the Trial Court in Petitioner's Trial Brief [C.T. pp. 91-93; 108-112; 54-90].

In the Trial Court, the California Attorney General on behalf of Respondents repeatedly acknowledged that:

a. The severity of the penalty was based upon Petitioner's failure to account for the refunding of purport-

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[6]Such an offer of proof was made before the Board, but was rejected (Transcript of Appeals Board Hearing, p. 71, line 4 to p. 72, line 20).

ed overcharges of more than $16,000 and not upon the three violations of §4456 and nine violations of §11713(g) charged and proved [C.T. p. 398, lines 27-30; p. 416, line 29 to p. 417, line 2; Transcript of May 5, 1971 hearing, p. 10, lines 11-15; p. 29, lines 16-19; p. 29, line 14 to p. 30, line 3; p. 37, line 28 to p. 39, line 14; Transcript of February 3, 1971, see p. 26, lines 17-22; p. 30, lines 7-9; p. 32, lines 21-22; p. 33, lines 3-20] and

b. That there was no charge, proof or finding that Petitioner had failed to refund said overcharges, but only that Petitioner had failed to prove to Respondents' satisfaction that such refunds had been made [Transcript of February 3, 1971 hearing, p. 28, lines 11-19; Transcript of May 5, 1971 hearing, p. 37, line 28 to p. 38, line 24; p. 43, line 27 to p. 44, line 16; see generally, p. 43, line 19 to p. 45, line 3].[7]

The Trial Court found[8] that the Department's findings set forth in Paragraphs 3(b) through (g)[9] "concern matters not charged in the Accusation, and the implied finding that there was a $16,570.03 credit balance for overcharged fees that had not been refunded

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[7]At one point he stated: "So, we haven't proven or alleged or found that they were failing to make refunds, essentially, supposedly a different violation." [Transcript of February 3, 1971 hearing, p. 28, lines 16-18.]

This is consistent with the Court of Appeal's statement (Appendix A, p. A-5):

> "The Board did not find that Williams committed any violations other than those charged in the Accusation."

[8]The trial court's Findings of Fact and Conclusions of Law appears as Appendix H.

[9]See Appendix F, Paragraph XI, pp. F-8 to F-9.

or credited to the accounts of customers to whom they belonged, is not within the scope of any charge alleged in the Accusation." (Appendix H, Paragraph XIII, p. H-9). The Court further found that such matters were "improperly considered by the Board in determining the nature and extent of the penalty assessed in the Final Order of the Board." (Appendix H, Paragraph XIII, p. H-9); and that the penalty assessed by the Department as well as the penalty assessed by the Board were not determined "solely upon the charges alleged in the Accusation" (Appendix H, Paragraphs XIV and XV, p. H-9). The Trial Court concluded that "Petitioner was denied due process of law and a fair hearing and that the penalty imposed was based upon matters outside the scope of the Accusation, *i.e.*, paragraphs (f) and (g) of Findings XI, relating to Petitioner's accounting procedures with respect to overcharge of registration fees, and the implied finding that the same were not refunded to the customers to whom they belonged." (Appendix H, Paragraph II, p. H-10). Judgment was entered granting Petitioner a peremptory writ of mandate directing that the Decision and Final Order of the Board be set aside (Appendix I).

6. The Court of Appeal Opinion.

Respondents appealed. Petitioner, as the respondent or appellee, asserted the constitutional questions raised herein. The Court of Appeal reversed the Trial Court, holding that:

> "Once the Board found the charged violations had taken place, it was entitled to consider relat-

ed deficiencies in order to . . . determine what administrative penalty . . . would be suitable. Evidence of other *possible* violations need not be disregarded by the Board in arriving at an appropriate penalty. . . ." (Appendix A, p. A-6).

"At bench Williams was given fair notice of the nine charged violations it was found to have committed. Other *potential* violations and related deficiencies were considered only in connection with a determination of the type and extent of the sanction to be imposed for the charged violations." (Appendix A, pp. A-6 and A-7; emphasis added).

Petitioner petitioned the California Supreme Court for a hearing, raising the constitutional issues presented here. Petition for Hearing was denied on April 4, 1973.

REASONS FOR GRANTING THE WRIT.

A. The Court of Appeal Opinion Conflicts With Decisions of This Court Concerning the Right to Prior Notice of the Charges as an Essential Element of Due Process.

1. At the outset, we note that Petitioner's right to engage in a lawful business and to retain a license permitting it to engage in a lawful activity is constitutionally protected and may not be impaired or abridged without due process of law.

See:

In re Ruffalo, 390 U.S. 544, 550;

Green v. McElroy, 360 U.S. 574, 592.

2. Next, in numerous recent cases, this Court has held that the first requisite of due process and a fair hearing is that the person whose rights are involved shall receive fair notice of the charges. In *Morrissey v. Brewer,* 408 U.S. 471, at 488-489, this Court enumerated "written notice of the charged violation . . ." as a minimum requirement of due process.

See also:

In re Ruffalo, supra, 390 U.S. 544, 550-552;

Fuentes v. Shevin, 407 U.S. 67, 80;

Rabe v. Washington, 405 U.S. 313, 315-316.

In re Ruffalo, supra, 390 U.S. 544, is particularly pertinent here. That case involved a federal court disbarment proceeding based upon an earlier state court proceeding. During the state court proceeding, a new charge was added against Mr. Ruffalo (Charge No. 13) on the basis of evidence which Mr. Ruffalo himself had introduced defensively to disprove some of the

earlier charges. The federal court disbarred him on the basis of Charge No. 13. Even though Mr. Ruffalo had been given a continuance for the purpose of preparing his defense to Charge No. 13 (page 547) this Court held that due process had been violated, stating at page 552:

> "The absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of due process of law."

In the present case, the California Court of Appeal held, by contrast, that the additional findings concerning Petitioner's accounting procedures, which were admittedly outside the scope of the Accusation "were pertinent to questions of . . . penalty. . . . Once the Board found the charged violations had taken place, it was entitled to consider related deficiencies . . . in order to determine what administrative penalty . . . would be suitable." The Court of Appeal attempted to distinguish *In re Ruffalo* by pointing out that Petitioner "was given fair notice of the nine charged violations it was found to have committed. Other potential violations and related deficiencies were considered only in connection with a determination of the type and extent of the sanction to be imposed for the charged violations."

The reasoning of the California Court of Appeal is in conflict with the decisions of this Court cited above and effectively nullifies the prior notice requirement of due process. The penalty, after all, goes to the heart of the matter. It is the penalty which punishes and impairs constitutionally-protected rights. If the penalty can be based upon purported violations not included within the scope of the Accusation, then the notice requirement of due process is seriously weakened.

This erosion of fair notice is forcefully illustrated in the present case. As previously noted, the California Attorney General expressly acknowledged that the severe penalty imposed against Petitioner was not based upon the minor violations charged and proved, but instead was based upon Petitioner's failure to prove the refunding of other overcharges, a matter outside the scope of the Accusation. It follows that, for practical purposes, the Accusation was virtually meaningless for the reason that the penalty was admittedly based almost entirely or entirely upon new matters concerning which Petitioner was given no advance notice by the Accusation.

3. *In re Ruffalo* also forbade amending the charges during the hearing on the basis of defensive or mitigating evidence introduced by the accused, observing at page 551:

> "The charge must be known before the proceedings commence. They become a trap when, after they are under way, the charges are amended on the basis of testimony of the accused. . . ."

In the present case, nearly all of the evidence concerning refunds, and all of the evidence concerning Petitioner's accounting procedures and additional violations of §4456, came in by way of mitigation or at the demand of the Hearing Officer. Moreover, there was never any amendment to the original charges. The "trap" was more pervasive here than in *Ruffalo*.

The clear conflict between the Court of Appeal Opinion and the decisions by this Court noted above, coupled with the possibilities for mischief to and impairment of the notice requirements of procedural due process in the vast area of government regulation of business, justi-

fy the grant of certiorari to review the Judgment of the California Court of Appeal.

B. The Decision of the Court of Appeal Is in Conflict With Decisions of This Court Holding That a Person Cannot Be Deprived of Constitutionally Protected Rights on the Basis of "Possible" or "Potential" Uncharged Offenses, i.e., Offenses of Which He Was Neither Proved nor Adjudged Guilty.

1. In criminal proceedings, where there is no evidence to support a conviction, the conviction is void as a denial of due process.

Gregory v. City of Chicago, 394 U.S. 111, 112;

Thompson v. City of Louisville, 362 U.S. 199, 204.

The same rule applies to administrative disciplinary proceedings. Constitutionally protected rights cannot be impaired by administrative action which is lacking in evidentiary support.

See: *Greene v. McElroy, supra,* 360 U.S. 474, 496;

Schware v. Board of Bar Examiners, 353 U.S. 246-247;

Garvey v. Freeman (10th Cir. 1968) 397 F. 2d 600, 610 [". . . an administrative order without factual support is without due process."].

2. Next, constitutional requirements of due process are violated when the prosecution attempts to shift to the accused the burden of proving he is innocent.

See:

Deutsch v. United States, 367 U.S. 456, 471;

Speiser v. Randall, 357 U.S. 513, 523-524;

Smith v. Smith (5th Cir. 1971) 454 F.2d 572, 579.[10]

In the present case, Respondents admitted that a severe penalty was imposed, not because of the relatively minor violations charged and proved, and not even because Petitioner was found guilty of failing to refund overcharges of more than $16,000, but, rather, because Petitioner failed to prove that in fact had refunded said sums. In the Trial Court, the Attorney General explicitly acknowledged that there were neither allegations, proof, nor findings that Petitioner had failed to make said refunds.

Nevertheless, Respondents determine that it was Petitioner's burden to prove that such refunds had been made, and the severe penalty imposed was based upon Petitioner's failure to meet this burden of proof. This failure of proof on Petitioner's part was certainly understandable in view of the facts that (1) this entire matter was outside the scope of the Accusation, and Petitioner therefore had no prior notice it would be in issue; and (2) as noted above, under California law, the burden of proving misconduct in an administrative discipli-

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[10]Under California law the burden of proving misconduct in administrative disciplinary proceedings rests upon the party making the charges, and guilt must be established to a reasonable certainty.

Martin v. State Personnel Board (1972) 26 Cal.App. 3d 573, 582;

Johnstone v. City of Daly City (1958) 156 Cal.App. 2d 506, 515-516.

See also:

Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 103-105.

nary proceeding rests with the party making the charges, and guilt must be established to a reasonable certainty. Surely, due process forbids punishing Petitioner under these circumstances.

The clear violation of due process and the fundamental unfairness involved in punishing Petitioner for possible or potential offenses which were never charged, proved, nor adjudged by Respondents further warrants the grant of certiorari to review the judgment of the California Court of Appeal.

Conclusion.

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinion of the California Court of Appeal.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeal.

CERTIFIED FOR PUBLICATION

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Ralph Williams Ford, a California corporation, Petitioner and Respondent, v. New Car Dealers Policy and Appeals Board, and Department of Motor Vehicles, Appellants. 2d Civil No. 40265, (Sup.Ct.No. 979 623)

Filed: February 9, 1973.

APPEAL from judgment of the Superior Court of Los Angeles County. Charles H. Church, Judge. Reversed with directions.

Evelle J. Younger, Attorney General, Alan Hager, Deputy Attorney General, for Appellants.

Messrs. Linder, Schurmer, Drane & Bullis, Ellis J. Horvitz, for Respondent.

The New Car Dealers Policy and Appeals Board, pursuant to its authority under Vehicle Code sections 3050 to 3057, affirmed a decision of the Director of Motor Vehicles finding that Ralph Williams Ford (Williams) on three specified occasions in 1968 violated Vehicle Code, section 4456, and on nine specified occasions in 1968 violated Vehicle Code, section 11713 (g).[1] The Board, separately for each group of viola-

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[1]Vehicle Code section 4456 in pertinent part authorizes the dealer to issue a temporary identification device to the purchaser, provided the dealer applies to the Department on behalf of the purchaser for registration or transfer of the vehicle within twenty days of sale.

Vehicle Code section 11713(g) makes it unlawful and a violation of the Vehicle Code for a license holder to include as an added cost to the selling price of a vehicle an amount for licensing or transfer of title which is not owed to the state, unless the amount has been paid by the dealer prior to the sale.

tions, revoked Williams' dealer's license, certificate, and special plates; stayed the revocation; and placed Williams on a three-year probation whose conditions included a 10-day suspension of its dealer licensing privileges.

The superior court confirmed the Board's findings with respect to the violations but ordered the cause remanded to the Board for reconsideration because in the court's view the Board, (1) wrongfully imposed administrative penalties for violations of section 4456, (2) violated due process of law in finding Williams guilty of uncharged violations, and (3) imposed improper procedural terms for future revocation of probation.

The Board and the Department appeal the judgment.

1. Section 4456.

The Board found that on three occasions Williams violated section 4456 by failing to file timely reports of sale and documents and fees for the transfer or registration of vehicles. The Board noted that these violations represented only a small part of the untimely reports of sale submitted by Williams. The superior court, on an independent review of the evidence pursuant to Code of Civil Procedure, section 1094.5, confirmed the findings of the Board, but concluded that the $3 forfeiture imposed by section 4456 (now by section 4456.5) was the sole penalty applicable to these violations, and therefore administrative penalties of suspension and revocation were not authorized.

We disagree with the conclusion of the superior court that the penalty for these 1968 violations was limited to a $3 forfeiture, since at that time administrative penalties authorized by section 11705 were clearly ap-

plicable to such violations.[2] (See *Evilsizor v. Dept. of Motor Vehicles*, 251 Cal.App.2d 216, 218-220, decided May 1967.) Not until 1970 did the Legislature enact section 4456.5 to limit the penalty for certain violations of section 4456 to a $3 forfeiture. Williams argues that the changes brought about by the enactment of section 4456.5 in 1970 should be used to reinterpret the intent of the Legislature in enacting the earlier texts of section 4456 in 1959, 1961, and 1963. We decline this invitation to embark on a voyage of retrospective reinterpretation.

Williams also contends that because the subsequently enacted section 4456.5 reduced in certain instances the penalties for violation of section 4456, the section should be applied retroactively by the courts to the violations that occurred in this case. We do not agree. It is presumed that legislative changes do not apply retroactively unless there is a clear legislative intent that they should do so. (*Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control*, 65 Cal.2d 349, 371.) Had the Legislature merely mitigated the penalty for a violation of section 4456 we might well conclude it had made an express determination that its former penalty had been too severe and that a lesser penalty would be more appropriate. (See *In re Estrada*, 63 Cal.2d 740, 745.) But in adopting section 4456.5 the Legislature enacted a new, comprehensive scheme which completely revised the scope of the penalties attached to violations of section 4456. The basic penalty for violation of section

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[2]Vehicle Code section 11705 (now renumbered section 11705 (7) and (9)) provides that the Department after notice and hearing may suspend or revoke a dealer's license upon determining that the dealer has violated one or more of the terms and provisions of those parts of the Vehicle Code that include sections 4456 and 11713(g).

4456 is made a $3 forfeiture, but failure to pay fees to the department within 20 days continues subject to the penalty of suspension and revocation. And failure to present a proper application in compliance with section 4456 within 40 days creates a presumption of failure or neglect that provides *prima facie* grounds for suspension and revocation under section 11705.

We do not believe the Legislature could have reasonably intended these complex changes to be applied retroactively to cases, such as this one, that had reached final administrative decision prior to the effective date of the new law. As the court said in *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control, supra,* at 372: "The Legislature's alteration of the method for enforcement of a statute, however, ordinarily reflects its decision that the revised method will work greater future deterrence and achieve greater administrative efficiency. Yet the design for efficacy of deterrence and efficiency of administration hardly affects the case which has already reached a final administrative decision based upon the old procedure."

2. *Uncharged Violations.*

The Board adopted the findings of the Director of Motor Vehicles relating to the accounting procedures used by Williams before and after the filing of the accusation of registration-fee overcharges. Key findings included:

"XI 3(d). . . . Respondent did not maintain any journals, subsidiary ledgers or any other type of accounting records wherein it could be ascertained the name of the purchaser, the amount of money deposited by said purchaser for payment to the Department, the actual amount of money required by the Department

and the dates and amount of the refund of the overcharge to said purchaser. . . .

"(e). Respondent's employees on the managerial level, including the certified public accountant auditor, knew that the deposits made by purchasers for the fees due the Department, were fiduciary moneys requiring the highest degree of accountability. . . .

"(f). At the end of respondent's 1968 accounting period, the expense account to which respondent credited the refunds from the Department had a credit balance of $16,570.03 . . .

"(g). With one exception, respondent did not refund the excess deposit fees to purchasers identified in Finding X hereof until subsequent to the service of the Accusation."

The superior court concluded that these findings "concern[ed] matters not charged in the Accusation, and the implied finding that there was a $16,570.03 credit balance from overcharged fees that had not been refunded or credited to the accounts of customers to whom they belonged, is not within the scope of any charge alleged in the Accusation. [These findings] were improperly considered by the Board in determining the nature and extent of the penalty . . ."

In our view the superior court misconstrued the relationship between charges and findings in the administrative proceedings. The Board did not find that Williams committed any violations other than those charged in the accusation. Williams produced evidence of its accounting procedures in an attempt to show it had not made the overcharges set forth in the accusation. In response to that evidence the Board made findings which showed that it did not credit the evidence

produced by Williams to rebut proof of overcharges, and that Williams' accounting procedures were inadequate to disclose what refunds, if any, were routinely made to overcharged purchasers. The Board's basic finding that on nine occasions the price of vehicles sold by Williams included as an added cost specified licensing or transfer fees not owed to the state (Veh. Code, § 11713(g)) remained unaffected by additional findings on the subject of Williams' accounting procedures. These additional findings, however, were pertinent to questions of due care, penalty, and conditions of probation. Once the Board found the charged violations had taken place, it was entitled to consider related deficiencies in order to evaluate the amount of due care exercised by Williams in past attempts to comply with the statute and in order to determine what administrative penalty and what conditions of probation would be suitable. (*Mills v. State Bar,* 6 Cal.2d 565, 567.) Evidence of other possible violations need not be disregarded by the Board in arriving at an appropriate penalty and appropriate conditions of probation, merely because that evidence was produced by Williams.

In re Ruffalo, 390 U.S. 544, and related cases are not controlling. In *Ruffalo,* an attorney was disbarred from the practice of law on a finding he was guilty of an instance of misconduct that had not been charged against him in the disbarment proceedings until after he had presented evidence to rebut the instances of misconduct with which he had been initially charged. The court overturned the disbarment on the ground that procedural due process requires fair notice of a charge before proceedings commence. (390 U.S. at 550-551.) At bench Williams was given fair notice of the nine charged violations it was found to have committed.

Other potential violations and related deficiencies were considered only in connection with a determination of the type and extent of the sanction to be imposed for the charged violations.

3. Condition of Probation.

A condition of probation exposed by the Board on Williams stated: "Should the Director of Motor Vehicles at any time during the existence of said probationary period determine upon reliable evidence that appellant has violated any of the terms and conditions of probation, he may, in his discretion and *without a hearing,* revoke said probation and order the suspension or revocation of appellant's license, certificate and special plates . . ." (Italics added.)

The superior court properly concluded that the italicized portion of this condition of probation violated due process of law. The Fourteenth Amendment protects the pursuit of one's profession from abridgment by arbitrary state action, and a state cannot exclude a person from any occupation in a manner or for reasons that contravene due process of law. (*Endler v. Schutzbank,* 68 Cal.2d 162, 169-170.) Here, the revocation of probation, and therefore the revocation of Williams' dealer's license, is left to the discretion of the Director of Motor Vehicles. But "an individual must be afforded notice and an opportunity for a hearing before he is deprived of any significant property interest.") *Randone v. Appellate Department,* 5 Cal.3d 536, 541.) Although Williams received notice and a hearing on its past violations, the conditions of probation dispense with notice and hearing on any future violations that may bring about a revocation of its license.

In criminal law "fundamental principles of due process and fair play demand, . . . that after a summary revocation of probation and before sentencing a hearing is required at which the defendant is entitled to be represented by counsel, to be advised of the alleged violation and given an opportunity to deny or explain it, and, if necessary, present witnesses on his own behalf." (*People v. Youngs,* 23 Cal.App.2d 180, 188; *People v. Vickers,* 8 Cal.3d 451, 458-461; see also, *Morrissey v. Brewer,* 408 U.S. 471.) Due process requires a comparable opportunity for notice and hearing on the revocation of an occupational license. (Cf. *Goldberg v. Kelly,* 397 U.S. 254.)

The judgment granting the writ of mandate is reversed, and the cause is remanded to the superior court with instructions to issue its writ for the sole purpose of directing the Board to strike from page 32 of its final order the phrase "without a hearing" and substitute therefor the phrase "on notice and hearing." Appellants to receive their costs on appeal.

CERTIFIED FOR PUBLICATION.

Fleming, *J.*

We concur:

Roth, *P. J.*

Herndon, *J.*

APPENDIX B.

Clerk's Office, Supreme Court, 4250 State Building.

San Francisco, California 94102, April 4, 1973.

Dear Sir: *I have this day filed Order:* HEARING DENIED.

In re: 2 Civ. No. 40265 Ford (Ralph Williams) v. New Car Dealers Policy and Appeals Board.

Respectfully,

G. E. BISHEL
Clerk

APPENDIX E.

APPENDIX C.

Duplicate of Dealer's Report of Sale

*4456. (a) Dealer's certificated under Section 11702 may be authorized under rules and regulations of the department to issue copies of the dealer's report of sale form distributed by the department. Vehicles upon which the copy of the report of sale is displayed may be operated without the registration card or plates provided for herein for a period not to exceed 10 days if a new vehicle, and not to exceed 20 days if a used vehicle upon condition that the fees and any penalties due for registration of the vehicles are paid to the department within the 10- or 20-day period and that the report of sale and copy are used pursuant to subdivision (b) hereof and rules and regulations of the department. When the fees and any penalties have been paid within the specified 10- or 20-day period, the vehicle may be operated on the copy of the report of sale as provided herein until such time as the license plate or registration receipt have been received from the department.

(b) The rules and regulations issued by the department concerning the dealer's report of sale and copy shall provide for the copy and a device for identification purposes to be displayed on the vehicle sold by the dealer.

(c) The dealer shall, as a penalty to the State, forfeit three dollars ($3) for each report of sale or copy affixed by him to a vehicle other than that for which issued or used by him contrary to the provisions of this section or the regulations adopted pursuant thereto.

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*As of 1968

(d) The use by any dealer of a report of sale copy as provided herein shall obligate the delaer to pay the fees and penalties determined by the department to be due on the vehicle under Division 3 (commencing with Section 4000) of the Vehicle Code and Part 5 (commencing with Section 10701) Division 2 of the Revenue and Taxation Code and which have been advanced to the dealer by the customer either by cash, trade-in or under the provisions of a contract, and those penalties which have accrued because of failure of the dealer to make timely or proper application for his customer.

Amended Ch. 58, Stats. 1961. Effective Sept. 15, 1961.

Amended Ch. 1863, Stats. 1963. Effective Sept. 20, 1963.

APPENDIX D.

§ 11713. Unlawful acts

It shall be unlawful and a violation of this code for the holder of any license issued under this article:

. . .

(g) To include as an added cost to the selling price of a vehicle, an amount for licensing or transfer of title of the vehicle, which amount is not due to the state unless such amount has in fact been paid by the dealer prior to such sale.

APPENDIX E.

Accusation.

State of California, Department of Motor Vehicles.

In the Matter of the Accusation of Ralph Williams Ford, A California Corporation, Respondent. Case No. D-950.

F. J. WATSON, hereinafter called Accuser, alleges:

I

That he is now employed as Manager, Compliance Services, by the Department of Motor Vehicles and makes this Accusation upon information and belief in his official capacity, and not otherwise.

II

That at all times mentioned herein, Respondent, RALPH WILLIAMS FORD, a California corporation, was doing business at 15770 Ventura Boulevard, Encino, County of Los Angeles, State of California, operating said business under and by virtue of a dealer's license, certificate and special plates (D-1758) duly issued to it by the Department of Motor Vehicles.

III

That Respondent, contrary to Section 11713(a) of the Vehicle Code, caused to be broadcast, advertisements via the media of television in and about the greater Los Angeles area during the latter part of 1968 and the beginning of 1969, which were misleading and inaccurate in material particulars in that used vehicles were pictured on the television screen in such a manner as to lead the public to believe that the vehicles advertised were quality vehicles in good condition all offered for a low price when in fact such used vehicles were in disrepair and generally in poor condi-

tion, and said vehicles were advertised at low prices with the intent to entice members of the public to Respondent's place of business in order to sell different, higher-priced used vehicles, and not for the purpose of selling such advertised used vehicles.

IV

That Respondent, contrary to Section 11713(a) of the Vehicle Code, caused advertisements to be published in the L.A. TIMES, from on or about August 1968, to the present, examples of which are attached hereto as Exhibit *B* and by this reference made a part hereof, which were misleading and inaccurate in material particulars in that Respondent advertised used vehicles which were in disrepair and generally in poor condition at very low prices in such a manner as to lead the public to believe that he was advertising such vehicles in order to sell them when in fact such vehicles were advertised with the intent to entice members of the public to Respondent's place of business in order to sell different, higher-priced used vehicles and not for the purpose of selling such advertised vehicles and to mislead the public into believing that all of his used vehicles were so reasonably priced when in fact the "bait" vehicles were only a small percent of his stock.

V

That Respondent, contrary to Section 11713(a) of Vehicle Code, caused advertisements to be published in the L.A. TIMES from on or about August, 1968, to the present, examples of which are attached hereto as Exhibit *B* and by this reference made a part thereof, which were misleading and inaccurate in material particulars in that members of the public were led to believe

that certain vehicles were sold with a warranty when in fact no vehicles were sold with such warranty; rather the contracts entered into by Respondent and purchasers specifically excluded such warranty.

VI

That Respondent as an integral part of sales transactions for the purchase of vehicles described as items *1 through 12, and 20* in Exhibit *A*, attached hereto and by this reference made a part hereof, arranged through independent finance agencies for loans in behalf of customers which were used as down payments and other payments in connection with such vehicle purchases without reflecting the loan transaction in the conditional sales contracts, thereby violating Civil Code Section 2982(a) incorporated by reference in Vehicle Code Section 11705.

VII

That Respondent listed sums, which were properly down payments, as part of the unpaid balance in conditional sales contracts for the purchase of vehicles described as items *3, 9, 11, 15 and 18*, in Exhibit *A*, attached hereto and by this reference made a part hereof, thereby violating Civil Code Section 2982(a) incorporated by reference in Vehicle Code Section 11705.

VIII

That Respondent wrongfully and unlawfully used dealer's reports of sale, in that Respondent failed to mail or deliver the report of sale of a used vehicle, together with other documents and fees required to transfer the registration of the vehicles described as items *1 through 4*, in Exhibit *A*, attached hereto and by this reference made a part hereof, within the twenty

(20) day period allowed by law, thereby violating in each instance Section 4456 of the Vehicle Code and Section 460 (renumbered Section 410.01 effective July 13, 1968) Title 13 of the California Administrative Code.

IX

That Respondent reported to the Department a date of sale other than the true date of sale on the vehicles described as items *5 through 7*, in Exhibit *A*, attached hereto and by this reference made a part hereof, and did thereby make false statements or conceal material facts in the application for registration of such vehicles.

X

That Respondent included as an added cost to the selling price of the vehicles, described below, in Exhibit *A*, attached hereto and by this reference made a part hereof, additional registration fees as listed below in excess of the fees due and paid to the State, thereby violating Section 11713(....) of the Vehicle Code.

Items	Fees Due Department	Fees Charged Purchaser	Excess
12	$ 3.00	$40.00	$37.00
4	$48.00	$50.00	$ 2.00
6	$34.00	$35.00	$ 1.00
13	$47.00	$70.00	$23.00
14	$40.00	$42.00	$ 2.00
7	$42.00	$45.00	$ 3.00
15	$34.00	$40.00	$ 6.00
16	$33.00	$38.00	$ 5.00
17	$36.00	$60.00	$24.00

XI.

WITHDRAWN

That Respondent, contrary to Section 2981(f) of the Civil Code, wrongfully and unlawfully retained money deposited with it, pending the execution of a conditional sales contract for the purchase of the vehicle described as item #8 in Exhibit A, attached hereto and by this reference made a part hereof, and failed to return said money when a conditional sales contract was not executed.

XII

That by reason of the facts alleged in Paragraphs III through XI, inclusive, herein, Respondent has been guilty of acts or omissions, or both, constituting grounds for revocation or suspension of license, certificate and special plates under Section 11705 of the Vehicle Code.

WHEREFORE, Accuser prays that the Department of Motor Vehicles take such action to revoke or suspend the license, certificate and special plates of Respondent herein as it may deem proper under the circumstances.

DATED: Feb. 20, 1969.

/s/ F. J. Watson
F. J. WATSON, Manager
Compliance Services

APPENDIX F.

Decision.

State of California, Department of Motor Vehicles.

In the Matter of the Accusation of Ralph Williams Ford, A California Corporation, Respondent. Case No. D-950.

Filed: Sept. 29, 1969.

The Proposed Decision of the Hearing Officer, a copy of which is herewith served upon you and which has heretofore been filed as a public record as provided in the Government Code, Section 11517(b), is hereby adopted by the Director of Motor Vehicles of the State of California as his Decision in the above matter.

This Decision shall become effective Nov. 13, 1969.

IT IS SO ORDERED Sept. 29, 1969.

/s/ Verne Orr
VERNE ORR
Director

Proposed Decision.

Before the Department of Motor Vehicles, of the State of California.

In the Matter of the Accusation of Ralph Williams Ford, A California Corporation, Respondent. Case No. D-950, OLA 20658.

Filed: Sept. 29, 1969.

This matter came on regularly for hearing before A. J. McGuire, Hearing Officer of the Office of Administrative Procedure, at Los Angeles, California, on May 27, 1969, at 9:00 a.m., and on May 28, 29; June 18, 19, 20, 23; July 29, 30 and 31, all in 1969. Catherine D. McAndrews, Associate Counsel, represented the Department of Motor Vehicles and the respondent was represented by its counsel, Milton Linder and Scott Schurmer. Evidence both oral and documentary having been introduced and the matter submitted, the parties were allowed until September 3, 1969, in which to file points and authorities and the points and authorities having been filed and considered, the Hearing Officer finds as follows:

I

F. J. Watson made the Accusation in his official capacity as Manager, Compliance Services, Department of Motor Vehicles.

II

At all times mentioned herein, respondent, a California Corporation, was doing business at 15770 Ventura Boulevard, Encino, California, and operated its business under and by virtue of a dealer's license, certificate and special plates, D-1758, duly issued by the Department of Motor Vehicles, hereinafter referred to as the Department.

III

The word "respondent" as used herein is defined to include officers, agents, servants, sales personnel, managers, or any classification thereof, accountants, clerks, supervisors, and any person carried on the payroll of respondent as an employee.

IV

During the period from on or about July, 1968, to on or about February 29, 1969, respondent caused to be broadcast, advertisements via the media of television, used vehicles for sale at its place of business, but said advertisements were not misleading or inaccurate. It is true that many of the advertised used vehicles were offered for sale at a price lower than the average price for similar vehicles in the general marketing area. It is also true that respondent sold said used vehicles at the advertised price.

V

During the period from on or about August, 1968, to on or about February 29, 1969, respondent caused advertisements to be published in the Los Angeles Times, used vehicles for sale at its place of business, but said advertisements were not misleading or inaccurate. It is true that many of the advertised prices of the used vehicles were offered for sale at a price lower than the average price for similar used vehicles in the general marketing area. It is also true that respondent sold said advertised used vehicles for the advertised price.

VI

During the period from on or about August, 1968, to on or about February 29, 1969, respondent caused advertisements to be published in the Los Angeles Times that certain used vehicles would be sold with a

warranty. It is not true that such advertisements were misleading or inaccurate in any material particulars as to the warranties.

VII

Respondent arranged through independent finance agencies for loans on behalf of customer-purchasers, which were used as a part of the down payment on the vehicles described as Items 1, 6, 8 to 12, inclusive, and 20 of Exhibit A attached to the Accusation and made a part hereof by reference, which were not, in each instance, reflected in the conditional sales contracts.

It was established by the evidence that respondent would obtain credit information from the purchaser, evaluate such information, determine the amount of the down payment required, determine what side or secondary financing would be required to complete the transaction, select a finance agency, contact the selected finance agency, and furnish said finance agency with needed information, arrange an appointment for the customer at the finance agency to have the required documents executed and then receive checks from such finance agencies, payable either directly to respondent or jointly to the purchaser and respondent. Prior to the time the full down payment would be in the possession of respondent, respondent would execute the conditional sales contract and delivered the vehicle to the purchaser. In order for the purchaser to retain the vehicle, the purchaser would have to obtain the side loan.

Respondent also listed sums, which were properly down payments, as a part of the unpaid balance in conditional sales contracts. Examples of this are found in Items 3, 9, 11, 15 and 18 in Exhibit A, attached to the Accusation and incorporated herein by reference.

VIII

Respondent wrongfully and unlawfully used dealer's reports of sale in that respondent failed to mail or deliver the reports of sale of used vehicles, together with other documents and fees required to transfer the registration of the vehicles described as Items 1 through 4 of Exhibit A attached to the Accusation and made a part hereof by reference.

IX

Respondent reported to the Department of Motor Vehicles a date of sale other than the true date of sale on the vehicles described at items 5 through 7 of Exhibit A, attached to the Accusation and made a part hereof by reference, and did thereby make false statements or conceal material facts in the applications for registration of such vehicles.

X

Respondent included as an added cost to the selling price of the vehicles, hereinafter described, in Exhibit A, attached to the Accusation and incorporated herein by reference, additional registration fees as listed below in excess of the fees due and paid to the State:

Items	Fees Due Department	Fees Charged Purchaser	Excess
12	$ 3.00	$40.00	$37.00
4	$48.00	$50.00	$ 2.00
6	$34.00	$35.00	$ 1.00
13	$47.00	$70.00	$23.00
14	$40.00	$42.00	$ 2.00
7	$42.00	$45.00	$ 3.00
15	$34.00	$40.00	$ 6.00
16	$33.00	$38.00	$ 5.00
17	$36.00	$60.00	$24.00

XI

Respondent introduced evidence which proved the following facts:

1. Prior to the clarifying amendment to the Rees-Levering Act (Section 2982.5, Civil Code, which became effective in November, 1968), there was some ambiguity in the interpretation of Section 2982(a), Civil Code, as to whether or not the details of a secondary or side loans had to be included in a single document. Many vehicle dealers, including respondent, acting independently and on advice of their respective attorneys, elected to accept an interpretation of said Section 2982 (a), Civil Code, which did not require the details of the secondary or side loan to be reflected in a single document and the conditional sales contract form then in use did not provide space for the inclusion of such secondary or side loan information. Since the effective date of the clarifying amendment, respondent has complied with the single document legislation.

2. The delays occurring in the filing of the titling documents and payment of the registration were caused by factors, such as (1) failure of the selling dealer to turn over the titling documents promptly after respondent had purchased a vehicle; (2) failure of the legal owner such as a finance agency to release the titling documents; (3) failure of an individual owner to turn over to respondent the titling documents on the trade-in vehicle; (4) the necessity to secure a duplicate pink certificate when the owner had lost or misplaced the original pink certificate; (5) on out-of-

state vehicles the necessity of securing from the various owners in the non-title states, bills of sale to the vehicles from the prior owners, and (6) on very rare occasions due to volume of paper work in respondent's office, the titling documents were misplaced. The Department of Motor Vehicles Section of respondent followed a system that upon the receipt of information relative to the purchase or trade-in of a vehicle without complete titling documents, a follow-up was immediately started such as contacting the selling dealer, the individual seller, the prior financing agency, the Department to ascertain the names of the registered and legal owners, the out-of-state owners or any other sources in order to secure the documents. A current file, which was reviewed daily by the head of the Department of Motor Vehicles Section, was kept and after the 15th day following the sale of a vehicle, increased efforts were made to secure any of the missing titling documents. Should the titling documents be not delivered to the Department of Motor Vehicles within the statutory time allowed, respondent would pay the misuse fee.

3(a). Respondent used its own registration and license estimated fees primarily on those vehicles where the classification information was not immediately available, examples of this being (1) where the pink certificate was not in possession of respondent so that the classification could be obtained on which the fees could be calculated, and (2) vehicles that had not been previously registered in California and the amount of the fee was determined by the Department based on the selling price of such vehicle.

(b). In respondent bookkeeping system, the deposit of the estimated fees due the Department were credited to its account #104. When the titling documents and fees were ready to be delivered to the Department, a check was issued and the amount of such check was debited to account #104. In those instances where the Department determined that the fees due were less than the amount deposited by the purchaser and refunded the overcharge to respondent, respondent would credit the amount of the refund to an expense account. Where the Department determined that the fees were insufficient, respondent would be billed and the amount of the undercharge would be debited to the same expense account that refunds were credited.

(c). It was the duty of a clerk in respondent's DMV Section to review the bundle sheet returned by the Department and if respondent had made any overcharge, to see that a refund was made to the purchaser; that if an undercharge was made to the purchaser of $5.00 or less, respondent would absorb the loss; if the undercharge was more than $5.00, the purchaser would be billed one time only for the amount of the deficiency.

(d). The record respondent maintained as to the deposit of estimated fees by the purchaser was on the motor vehicle purchase order. Respondent did not maintain any journals, subsidiary ledgers or any other type of accounting records wherein it could be ascertained the name of the purchaser the amount of money deposited by said purchaser for payment to the Department, the actual

amount of money required by the Department and the dates and amount of the refund of the overcharge to said purchaser. The only check respondent made in 1968 to ascertain the refund of any overcharge to the purchaser was the procedure set out in 3(c) hereof and had no accounting procedures to verify the accuracy of the work of such clerk.

(e). Respondent's employees on the managerial level, including the certified public accountant auditor, knew that the deposits made by purchasers for the fees due the Department, were fiduciary moneys requiring the highest degree of accountability. Respondent did not meet this requirement. In 1969 respondent modified its accounting procedure as to the accountability of fiduciary moneys, but the evidence did not establish how effective that such modification may be.

(f). At the end of respondent's 1968 accounting period, the expense account to which respondent credited the refunds from the Department had a credit balance of $16,570.03 from this source.

(g). With one exception, respondent did not refund the excess deposit fees to purchasers identified in Finding X hereof until subsequent to the service of the Accusation.

Pursuant to the foregoing Findings of Fact, the Hearing Officer makes the following determination of issues:

I

Cause for disciplinary action has been established under the provisions of Section 2982(a) of the Civil Code in conjunction with Section 11705 of the Vehicle

Code. The facts established in sub-finding 1 of Finding XI hereof were considered for mitigation purposes only and do not constitute a defense.

II

Cause for disciplinary action has been established under the provisions of Sections 4456 and 5753 of the Vehicle Code.

III

Cause for disciplinary action has been established under the provisions of Section 11713 (h), (later amended to be sub-paragraph g) of the Vehicle Code.

IV

There is no cause for disciplinary action under Section 2981 (f) of the Civil Code and Section 11713 (a) of the Vehicle Code.

V

The facts proven by respondent have been considered in connection with the penalty hereinafter recommended.

VI

The causes of discipline established in Determination of Issues I and II hereof, justify the imposition of a suspension of respondent's license, certificate and special plates.

VII

The cause of discipline established in Determination of Issues III hereof justify the revocation of respondent's license, certificate and special plates.

* * *

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. The dealer's license, certificate and special plates D-1758 heretofore issued to Ralph Williams Ford, a

California Corporation, by the Department of Motor Vehicles, are suspended for a period of 15 days. Execution of the order of suspension is hereby stayed on the condition that respondent complies fully with the terms of Paragraph 2 of this Order.

2. The dealer's license, certificate and special plates D-1758 heretofore issued to Ralph Williams Ford, a California Corporation, are hereby revoked; provided, however, that the execution of the order of revocation is hereby stayed for a period of three (3) years from the effective date of this decision, during which time respondent shall be placed on probation to the Director of the Department of Motor Vehicles of the State of California upon the following terms and conditions:

(a) That for a period of ten (10) days, immediately following the effective date of this decision, respondent shall not exercise any of the rights or privileges granted by its license, certificate and special plates D-1758.

(b) Respondent shall obey all of the laws of the United States, the State of California and its political subdivisions, and the rules and regulations of the Department of Motor Vehicles of the State of California governing the exercise of its privileges as a licensee.

(c) Respondent shall forthwith install, if it has not already done so, adequate accounting procedures, together with appropriate accounting controls, that will reflect the receipt and disbursements of all funds of money received as deposits for the payment of registration and license fees to the State of California. Said accounting procedures shall include, but not be limited to, records that will show

the name of the person depositing the money, the amount of money so deposited, the amount of money paid to the Department of Motor Vehicles on behalf of the persons so depositing such money, the refund of any excess money to such person, and the dates on which each of said events occurred. Respondent shall further file, during the probationary period herein fixed with the Director of Motor Vehicles at his office in Sacramento, California, a quarterly affidavit, executed under the penalty of perjury, by a responsible officer or a certified public accountant of respondent, attesting to the fact of respondent's compliance with this term and condition of probation and noting specifically in said affidavit any exception to the full compliance with this term and condition of probation. Said affidavit shall be filed no later than the 15th working day after the close of the quarterly period of time. The first affidavit shall be filed at the expiration of the first quarter immediately following the effective date of this decision. Said accounting procedures shall be available for inspection, including the right to make copies thereof, to authorized representatives of the Department of Motor Vehicles at respondent's place of business, during normal office hours of the respondent's business office, excluding Saturdays, Sundays and legal holidays.

3. Should the Director of Motor Vehicles at any time during the existence of said probationary period determine upon reliable evidence that respondent has violated any of the terms and conditions of probation, he may in his discretion and without a hearing, revoke

said probation and order the suspension or revocation of respondent's license, certificate and special plates D-1758 as hereinabove set forth; otherwise, upon full compliance by respondent with all of the terms and conditions of probation set forth and upon the expiration of the term of probation, said stay of said Orders of Suspension and Revocation shall become permanent.

I hereby submit the foregoing which constitutes my Proposed Decision in the above-entitled matter, as a result of the hearing had before me on the above-mentioned dates at Los Angeles, California, and recommend its adoption as the decision of the Department of Motor Vehicles.

/s/ Alfred J. McGuire,
ALFRED J. McGUIRE, Hearing Officer

DATED: September 16, 1969.

APPENDIX G.

Final Order.

State of California, New Car Dealers Policy & Appeals Board.

In the Matter of Ralph Williams Ford, a California Corporation, Appellant, vs. Department of Motor Vehicles, Respondent. Case No. A-5-69, Filed and Served: June 11, 1970.

Time and Place of Hearing: May 20, 1970, 10:30 A.M. 3500 South Hope Street, Los Angeles, California.

For Appellant: Linder, Schurmer, Drane & Bullis, By: Scott Schurmer, Attorney at Law, 9107 Wilshire Boulevard, Beverly Hills, CA 90210.

For Respondent: Honorable Thomas Lynch, Attorney General, By: Mark Leicester, Deputy Attorney General.

In the decision ordered September 29, 1969, by the Director of Motor Vehicles pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, it was found that appellant: (1) entered into conditional sale contracts for the purchase of motor vehicles in 8 instances without including in a single document all of the agreements of the buyer and the seller with respect to the total cost and terms of the payment of the motor vehicles; (2) listed in 7 instances sums as part of the unpaid balance in conditional sale contracts when these sums should have been listed as down payments; (3) wrongfully and unlawfully failed in 4 instances to deliver to respondent the reports of sale of vehicles together with such other documents and fees required to transfer registration of the vehicles within the period allowed by law; (4) reported to respond-

ent in 3 instances a date of sale other than the true date of sale on certain vehicles and did thereby make false statements or conceal material facts in the application for registration of the vehicles; and (5) in 9 instances, included as an added cost to the selling price of the vehicles, registration fees in excess of the fees due and payable to the state.

The penalty imposed by respondent provides as follows:

1. Suspension of the license, certificate and special plates for a period of 15 days, said suspension stayed on condition that appellant comply fully with the terms of probation set forth below.

2. Revocation of the license, certificate, and special plates, said revocation stayed for 3 years on condition that appellant comply fully with the following terms of probation:

(a) For 10 days appellant shall not exercise any of the rights or privileges granted by its license, certificate and special plates;

(b) Appellant shall obey all laws;

(c) Appellant shall install adequate accounting procedures and appropriate accounting controls that will reflect the receipt and disbursements of all funds received as deposits from customers for vehicle registration and license fees, said accounting procedures to include records showing the name of the person depositing the money, the amount of money so deposited, the amount of money paid to DMV, the refund of any excess money to such person and the dates on which said events occurred. Appellant shall further file during the probationary pe-

riod with DMV an affidavit by a responsible officer or C.P.A. of appellant's attesting to the fact of appellant's compliance of said probation and noting any exception in the affidavit to full compliance. The accounting procedures shall be available for inspection to authorized representatives of DMV at appellant's place of business.

(d) Should the Director of Motor Vehicles determine upon reliable evidence that appellant violated any of the terms and conditions of probation, he may, in his discretion and without a hearing, revoke the probation and order the suspension or revocation of appellant's license, certificate and special plates. If no such action by the Director shall occur before the expiration of the three-year term of probation, the stay of the orders of suspension and revocation shall become permanent.

An appeal was filed with this Board pursuant to Chapter 5, Division 2 of the Vehicle Code. For reasons hereinafter stated, we affirm the decision in part, reverse in part and modify the penalty.

I. DID APPELLANT VIOLATE SECTION 2982 (a) CIVIL CODE[1] BY FAILING TO INCLUDE IN THE CONDITIONAL SALE CONTRACT A LOAN AGREEMENT ENTERED INTO BETWEEN THE BUYER AND AN INDEPENDENT LOAN COMPANY FOR THE PURPOSE OF MAKING THE DOWN PAYMENT?

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[1]The events with which we are concerned occurred prior to the enactment of Section 2982.5 of the Civil Code which specifically provides for the inclusion in the conditional sale contract of data concerning side-loans which the seller assists the buyer

(This footnote is continued on next page)

We passed on this question in Holiday Ford v. Department of Motor Vehicles A-1-69 and Ralph's Chrysler-Plymouth v. Department of Motor Vehicles A-3-69 and answered it in the negative. Nothing presented in this case requires or allows us to rule differently.

We hold that respondent proceeded in a manner contrary to law with reference to its finding that appellant violated Section 2982(a) Civil Code as to each of the vehicles described as Items 1, 6, 8 through 12 inclusive, and 20 of Exhibit A attached to the Accusation and, therefore, we reverse this finding of respondent for the reasons given in our Final Orders in Holiday Ford and Ralph's Chrysler-Plymouth, supra.

II. DID APPELLANT VIOLATE SECTION 2982 (a) CIVIL CODE BY DESIGNATING AS PART OF THE UNPAID BALANCE IN CONDITIONAL SALE CONTRACTS THE AMOUNTS OF CURRENTLY DATED PERSONAL CHECKS DELIVERED TO THE APPELLANT AT OR BEFORE THE TIME THE CONTRACT FOR THE PURCHASE OF THE VEHICLE WAS ENTERED INTO?

Respondent found that appellant received currently dated personal checks from certain buyers at or before the time the conditional sale contract was entered into and entered the amount of the check in the contract as a part of the unpaid balance, payable on the date the buyer signed the contract, rather than as part of the down payment. The testimony of appellant was un-

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to obtain. In this regard the Legislature provided that the enactment of Section 2982.5 "shall not give rise to any inference that conduct to which it relates . . . was legal or illegal prior" to its effective date. (Ch. 979, Stats. 1968.)

controverted that such amounts were subtracted from the unpaid balance before determining the finance charge on that balance. Appellant's testimony established that it entered the amount of the checks as a part of the unpaid balance, rather than the down payment, because it was unwilling to treat the personal checks as cash, and so that the buyers would be in default in the event they stopped payment on the checks or if they were not honored by the bank upon which drawn. Respondent takes the position that this practice of appellant is harmful because it hinders rather than helps disclosure of the complete transaction regarding the purchase of the vehicle. Respondent correctly contends that one cannot determine from the face of the contract whether finance charges do encompass the amount of the check and, thus, cannot accurately determine the rate of the interest.

Respondent argues that appellant's assumption that a currently dated personal check tendered by the purchaser to be credited to the down payment may be treated as a promise to pay a sum in the future is legally erroneous. Respondent bases its argument upon an interpretation of Sections 2981(f) and 2982(a) Civil Code. It further seeks to bolster the argument by citing Bratta vs. Caruso Car Company, 166 Cal. App. 2nd 661; 33 P.2nd 807; Highway Trailer of California, Inc., vs. Frankel, 250 Cal. App.2nd 733; and Albert vs. Pearson, 68 Cal. App. 657.

As worthy as respondent's position may be for consumer protection, neither the statutes nor the cases cited support respondent. Moreover, respondent entirely overlooks the basic purpose of the conditional sales contract, namely, to secure payment to the seller of

the unpaid balance, which is the amount remaining due after crediting the cash and value of whatever property the seller agrees to treat as having been paid against the sale price. Section 2981(f) Civil Code, at the time the sales with which we are concerned, reads as follows:

> " 'Down payment' means that part of the cash price which the buyer pays or agrees to pay to the seller in cash or property value or money's worth at or prior to delivery by the seller to the buyer of the motor vehicle described in the conditional sale contract, including the cash, property or thing of value which the buyer deposits with the seller pending execution of a conditional sale contract, which cash, property or thing of value shall be refundable to the buyer in the event a conditional sale contract is not executed, or if the property or thing of value traded in cannot be returned, the cash value thereof."

The language ". . . cash or property value or money's worth . . ." makes it abundantly clear that a down payment may consist of anything that has value and can be owned with ownership legally capable of being transferred to another. We have no doubt that a currently dated personal check falls within this broad definition. However, Section 2981(f) Civil Code is merely a definition and does not set forth the requirements of a conditional sale contract.

Section 2982(a) Civil Code is the basic statute designating what a conditional sale contract for the purpose and sale of a motor vehicle must contain. Sub-

paragraph 2 of that section provides that the following must be shown as a separate item:

> "The amount of the buyer's down payment, and whether made in cash or represented by the net agreed value of described property traded in, or both, together with a statement of the respective amounts credited for cash and for such property."

Thus, the statute contemplates that only cash or the amount allowed for property traded in, or both, be identified as the down payment. It does not contemplate a personal check, which the seller refuses to accept as cash until paid, be included as part of the down payment received at or before the signing of the contract.

Bratta vs. Caruso Car Company, supra, a case cited by respondent to support its theory that a currently dated personal check is cash, supports our interpretation of 2982(a) subdivision 2 Civil Code. There, the buyer was allowed to rescind a conditional sale contract for the purchase of a motor vehicle on the basis the seller had not followed the required form and requisites of Section 2982(a) Civil Code; i.e., he had designated the amount of a promissory note as part of the cash down payment. In reversing the judgment of the trial court, which had disallowed rescission, the appellate court rejected the dealer's argument that the note was properly a part of the down payment because it was "money's worth" as that term is used in Section 2981(f) Civil Code. The court, at p. 665-666, points out that both subdivision (f) of Section 2981 Civil Code and subdivision 2 of Section 2982(a) Civil Code distinguish between "cash" and "money's worth". The latter statute requires a separate statement in the contract as to the portion of the down payment made in

cash and the portion representing the value of the trade in.

Bratta vs. Caruso Car Company, supra, is not, as respondent contends, authority for the proposition that a currently dated personal check is "cash". That issue was not before the court; the question was whether or not a promissory note is cash and the court answered in the negative. In so doing, the court stated, "There is nothing to suggest that the word 'cash' in the statute is used in any other than its usually understood meaning of money." Highway Trailer of California, supra, is not authority for the proposition that a currently dated personal check could be shown as cash in a contract governed by Section 2982(a) Civil Code. The court expressly avoided ruling on the issue; it was only called on to decide whether a postdated check was cash and it answered the question in the negative.

The case of Albert v. Pearson, supra, cited by respondent during oral argument, is not authority for the proposition that a currently dated personal check is cash. The court said, "It may be conceded that a check is not cash, that is to say, it is not lawful money which a creditor can be compelled to accept. But, the law recognizes that by consent of sellers and buyers, a check may be used as representing cash." We are, in the case before us, concerned with the proper interpretation of the relevant statute. Here, the seller refused to credit the amount of the check against the sale price, and insisted that the amount of the check remain as part of the secured unpaid balance, until the check was paid.

We have been referred to no cases by respondent and we find none which hold that a personal check

is the equivalent of money. In our view, a currently dated personal check is merely an order upon a third party to pay another upon demand a sum of money designated on the face of the check.

A check is a direction to the bank to pay a certain sum of money to the person therein named. (Pullen v. Placer County Bank 138 Cal. 169; 66 Pac. 740.) A check is a request to another to pay to the payee thereof the sum named therein out of the funds supposed to be deposited to meet such check. (Williams v. Braun 14 Cal. App. 396; 112 Pac. 465.) A check is a bill of exchange drawn on a bank or banker, or a person described as such, on the face thereof, and payable upon demand without interest. (Nassano v. Tuolumne County Bank 20 Cal. App. 303; 130 Pac. 29.) A check drawn on a bank is a contract. (Roff v. Crenshaw 69 Cal. App. 2nd 536; 159 Pac. 2nd 661.) A check differs materially from a bank note, as the latter is issued as currency under legal restriction which gives to it the character of money whereas the check is not currency although it may pass current from hand to hand. (People v. Bedilion 206 Cal. App. 2nd 262; 24 Cal. Rptr. 19.) A "check" on the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money which the holder can enforce against the bank. It does not of itself operate as an equitable assignment. (Pease & Dwyer Co. v. State Nat. Bank, 88 S.W. 172-174, 114 Tenn. 693, quoting and adopting the definition in Florence Mining Co. v. Brown, 8 S.Ct. 531, 534.)

In light of the Bratta case, respondent's finding places an automobile dealer in a hazardous position, quite aside from losing his security interest in the car sold, to the extent of the amount of any unpaid personal check he may have been given by the buyer. If the dealer designated as "cash" the amount of the currently dated personal check tendered him at or before the signing of the conditional sale contract, the buyer could rescind the sale on the strength of the Bratta case because a "check" is not cash and, therefore, the contract would not reflect the true facts surrounding the transaction. On the other hand, respondent, operating on the theory that a check is the equivalent of cash, takes disciplinary action against dealers' licenses for drafting a conditional sale contract in a manner required by the law of the Bratta case.

We conclude that respondent has proceeded in a manner contrary to law with reference to its finding that appellant violated Section 2982(a) Civil Code in each of the vehicles described as Items 1, 6, 8 through 12 inclusive, and 20 of Exhibit A attached to the Accusation and, therefore, such finding is hereby reversed.

III. DID APPELLANT VIOLATE SECTIONS 4456 and 5753 V.C. BY FAILING TO TIMELY SUBMIT REPORTS OF SALE OF MOTOR VEHICLES TO DEPARTMENT OF MOTOR VEHICLES?

At page 3, paragraph VIII, of the Proposed Decision, adopted in its entirety by the Director of Motor Vehicles, it is found that appellant ". . . wrongfully and unlawfully used dealer's reports of sale in that it failed to mail or deliver the reports of sale of used

vehicles, together with other documents and fees required to transfer the registration of the vehicles described as Items 1 through 4 of Exhibit A attached to the Accusation." At page 7, paragraph II, of that document, it was determined that cause for disciplinary action had been established under the provisions of Sections 4456 and 5753 V.C.

We delete from that determination the reference to Section 5753 V.C. because the Accusation filed in this case did not charge a violation of Section 5753. Thus, the determination was outside the scope of the Accusation.

However, this deletion is of not significance in our penalty determination. The principle we announced at page 8 of Ralph's Chrysler-Plymouth, supra, is applicable here. We said:

> "We do not believe it is necessary to decide whether respondent's construction of Section 5753 V.C., as it read at the time with which we are concerned, is correct or erroneous because the applicability of that statute is of no significance in this case.
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> "Clearly Section 4456 V.C. was violated when appellant failed to forward fees and appropriate documents to DMV within twenty days from the date of sale. The passage of ten or more additional days aggravated the violation. The application of Section 5753 V.C. can do nothing to add or detract from appellant's misconduct. It is our view that the evidence relating to the length of delay in paying fees and submitting documents is a matter which is properly considered when determining severity of penalty for appellant's

violation of Section 4456 V.C. and that the department's findings regarding violation of Section 5753 V.C. are, at worst, harmless surplusage."

Respondent found that appellant violated Section 4456 V.C. in 4 instances. It was also found that appellant's delays, many of which were obviously not charged in the accusation, were caused by such factors as: (1) failure of the selling dealer to turn over the titling documents promptly after appellant had purchased the vehicle; (2) failure of the legal owner, such as the finance agency, to release the titling documents; (3) failure of an individual owner to turn over to respondent the titling documents on the trade-in vehicle; (4) the necessity to secure a duplicate certificate of ownership when the owner had lost or misplaced the original; (5) on out-of-state vehicles, the necessity of securing from the various owners in the non-title state bills of sale to the vehicles from the prior owners; (6) on very rare occasions, due to volume of work in the appellant's office, titling documents were misplaced.

Respondent conceded during oral argument that the reference to Item 4 (Patino) of Exhibit A, attached to the Accusation, was erroneous. The report of sale in that instance had been timely filed.

Appellant concedes that it did violate this statute in 3 instances and that disciplinary action can be taken for such violations. It argues that: ". . . any penalties for said violations under the legislative plan should be reserved for situations where there has been neglect

or intentional non-compliance with this code section." This is the same argument made in Ralph's Chrysler-Plymouth, supra, and rejected by this Board. We said at page 7 of our Final Order:

> "Appellant's argument that a dealer should be immune from administrative disciplinary action for violation of Section 4456 V.C. and implementing regulations, absent neglect or willful non-compliance, does violence to the legislative scheme created for the express purpose of assuring that documents of title to motor vehicles are handled in an orderly manner to the end that transfers of ownership of motor vehicles become a matter of public record in a reasonable time."

We note that the violations charged and proven by respondent represent only a small portion of the untimely reports of sale submitted by appellant. According to the testimony of a witness called by appellant, during the six-month period ending December 1968, appellant was averaging 17 late reports of sale per month. Furthermore, Ralph Williams testified that he considered paying, during July through December 31, anything under $50 to $60 per month for penalties for late reports of sale as excellent. At $3 an item, this would amount to 16 to 20 late reports of sale per month.

We affirm the respondent's finding that appellant violated Section 4456 V.C. as to those vehicles described as Items 1 through 3 in Exhibit A, attached to the Accusation.

IV. DID APPELLANT REPORT TO THE DEPARTMENT OF MOTOR VEHICLES DATES OF SALE OF MOTOR VEHICLES OTHER THAN THE TRUE DATES OF SALE?

At the outset, we reverse on the finding that a false date of sale was reported with reference to Item 7 (Hirschman) in Exhibit A, attached to the Accusation, because it is contrary to the preponderance of the evidence. The conditional sale contract offered into evidence by respondent as a part of its Exhibit 4 is dated June 15, 1968. Although an affidavit given by the buyer, nearly four months later, attests to a purchase date of June 14, 1968, on cross-examination, the affiant testified the purchase took place on a Saturday. June 15, 1968, was a Saturday; June 14, 1968, was a Friday. The date on the contract, and the testimony of the buyer, preponderate.

We now turn to the facts surrounding the transactions giving rise to the remaining 2 instances of reporting false dates of sale. The department charged that, in Item 5 of Exhibit A (Bejarano), the true date of sale was May 31, 1968, whereas the date reported by appellant was May 26, 1968. Referring to Item 6 in Exhibit A (Murillo), the department charged the true date of sale was August 29, 1968, whereas the date reported by appellant was August 11, 1968. The evidence established that in both instances the buyer signed the security agreement and took delivery of the vehicle on the date reported by appellant as the date of sale. In both instances, the parties later entered into another security agreement with reference to the purchase of the same vehicle on the dates the department alleged were the true dates of sale. The second contract, in both instances, was entered into for the purpose of

modifying the original contract. Section 5901 V.C. determines when, for the purpose of reporting to respondent, a sale of a motor vehicle takes place; i.e., when the buyer pays for the vehicle or signs a purchase contract or security agreement and takes physical possession or delivery of the vehicle. Respondent contends the purchase order or security agreement must be binding upon the parties to meet the requirements of this statute. With this we concur.

However, respondent then argues that the original security agreements signed by Bejarano and Murillo are not binding because they embodied a condition precedent; i.e., a sale would take place only if a down payment in a certain amount was obtained by the buyer. A sale did not occur, according to respondent, because one element was absent; an enforceable agreement.

We reject respondent's theory that the original agreements were not binding upon the parties. There was no condition precedent to the execution (signature and delivery) of the security agreement, or even to the obligation of the buyer to purchase the vehicle, in either of these transactions. Viewing the evidence most favorable to respondent, there was an oral promise by the seller to assist the buyer in obtaining a side-loan for part of the price. However, obtaining the side loan was neither a condition precedent to execution of the security agreement nor to the buyer's obligation to purchase the vehicle. Courts have traditionally construed doubtful language as promises rather than conditions (see 12 Cal. Jur. 2d 389-390, Contracts 171).

In both cases, the security agreements were signed, and the cars were delivered to the buyers, on the

dates reported by the seller, as required by Section 5901 V.C.

It should be noted in passing that, although the Director found that appellant had reported to respondent false dates of sale, the Director did not find that the false reporting was a cause for disciplinary action. Thus, respondent's erroneous interpretation of the law did not affect the penalty it imposed.

IV. DID APPELLANT VIOLATE SECTION 11713 (h) V.C. (NOW (g)) BY INCLUDING, AS AN ADDED COST TO THE SELLING PRICE OF VEHICLES, REGISTRATION FEES IN EXCESS OF THOSE DUE AND PAID THE STATE?

Respondent found that appellant had, in 9 instances, charged the purchasers of motor vehicles, registration fees in excess of the amount required by law. Respondent also found:

"3(a) '. . . appellant . . .' used its own registration and license estimated fees primarily on those vehicles where the classification information was not immediately available, examples of this being (1) where the pink[2] certificate was not in possession of appellant so that the classification could be obtained on which the fees could be calculated, and (2) vehicles that had not been previously registered in California and the amount of the fee was determined by the Department based on the selling price of such vehicle.

"(b) In '. . . appellant's . . .' bookkeeping system, the deposit of the estimated fees due the Department were credited to its account #104.[3] When the titling

[2]The evidence shows that the word "white", referring to the registration certificate, was intended.

[3]The evidence shows that the number "204" was intended.

documents and fees were ready to be delivered to the Department, a check was issued and the amount of such check was debited to account #104.[8] In those instances where the Department determined that the fees due were less than the amount deposited by the purchaser and refunded the overcharge to '. . . appellant, appellant . . .' would credit the amount of the refund to an expense account. Where the department determined that the fees were insufficient, '. . . appellant . . .' would be billed and the amount of the undercharge would be debited to the same expense account that refunds were credited.

"(c) It was the duty of a clerk in '. . . appellant's . . .' DMV Section to review the bundle sheet returned by the Department and if '. . . appellant . . .' had made an overcharge, to see that a refund was made to the purchaser; that if an undercharge was made to the purchaser of $5.00 or less '. . . appellant . . .' would absorb the loss; if the undercharge was more than $5.00, the purchaser would be billed one time only for the amount of the deficiency.

"(d) The record '. . . appellant . . .' maintained as to the deposit of estimated fees by the purchaser was on the motor vehicle purchase order. '. . . Appellant . . .' did not maintain any journals, subsidiary ledgers or any other type of accounting records wherein it could be ascertained the name of the purchaser, the amount of money deposited by said purchaser for payment to the Department, the actual amount of money required by the Department and the dates and amount of the refund of the overcharge to said purchaser. The only check '. . . appellant . . .' made in 1968 to ascertain the refund of any overcharge to the purchaser was the procedure set out in 3(c) hereof and had

no accounting procedures to verify the accuracy of the work of such clerk.

"(e) '. . . Appellant's . . .' employees on the managerial level, including the certified public accountant auditor, knew that the deposits made by purchasers for the fees due the Department, were fiduciary moneys requiring the highest degree of accountability. '. . . Appellant . . .' did not meet this requirement. In 1969 '. . . appellant . . .' modified its accounting procedure as to the accountability of fiduciary moneys, but the evidence did not establish how effective that such modification may be.

"(f) At the end of '. . . appellant's . . .' 1968 accounting period, the expense account to which '. . . appellant . . .' credited the refunds from the Department had a credit balance of $16,570.03 from this source.[4]

"(g) With one exception '. . . appellant . . .' did not refund the excess deposit fees to purchasers identified in Finding X hereof until subsequent to the service of the Accusation."

Appellant contends that respondent failed to prove an overcharge of registration fees in the sale of the vehicles identified as Item 7 (Hirschman) and Item 15 (Faucher) in Exhibit A, attached to the Accusation. Referring to the registration fee charged Hirschman, the security agreement, which is part of respondent's Exhibit 4, established that appellant added to the purchase price of the vehicle the amount of $45 for such

[4]The use of the phrase "from this source" is erroneous. The uncontroverted testimony of appellant's witnesses clearly establishes that the $16,570.03 credited to Account 83 comes from two sources; i.e., the Department of Motor Vehicles and appellant's DMV Section. (See the testimony of Jack Crawford, R.T. 934, line 24 through R.T. 935, line 17, and R.T. 948, lines 12-14.)

fee. The master file reference copy of the certificate of ownership, issued 8/17/68, shows the correct fee to be $42. The "bundle sheet" shows that respondent also erred in that $45 was entered by it on the "bundle sheet" as the correct amount. We hold that, pursuant to Section 11713(h) (now g), the violation occurred when appellant included the excess amount in the selling price of the vehicle and the fact respondent also erred is a mitigating factor.

Referring to the registration fee charged Faucher, the security agreement, which is part of respondent's Exhibit 23, established that appellant added to the selling price of the vehicle the amount of $40 for such fees. The master file reference copy of the certificate of ownership, issued 8/17/68, shows the correct fee to be $34. In its opening brief, at page 48, lines 11-16, appellant states that the buyer paid $33 for registration fees, and that appellant actually undercharged this buyer. This is a distortion of the evidence. Appellant cites us to R.T. 581, lines 20-27, as support for its statement. The cited portion of the transcript contains testimony from appellant's "DMV Manager", Verla Markham. This witness testified, "She submitted—it is difficult to read this, but it appears that she submitted $33." The witness patently was not testifying as to the amount *charged the buyer* for registration fees; this witness testified as to the amount of such fees that appellant *submitted to the department*. "She" was an employee in appellant's DMV Section, not the buyer.

Furthermore, appellant, upon cross-examining Faucher, elicited testimony that $6 in excess registration fees was refunded Faucher five or six months after

the vehicle was purchased. Clearly, the buyer was overcharged $6.

We dismiss as being without merit appellant's argument that it is required to "estimate" registration fees. Appellant may, in the course of its business, and apparently it does, elect to estimate the amount of such fees. This is an election appellant has made, which is clearly not authorized by law. The statutes, and the classifications promulgated pursuant thereto by the Department of Motor Vehicles and charts furnished automobile dealers by the Department are clear and concise. There is no need for guesswork. At most, a simple mathematical calculation will determine the fee. The formulas set forth in Section 10751 et seq. Revenue and Taxation Code and the classifications made by respondent pursuant to these sections make irrelevant, for registration fee determining purposes, the fact that a passenger vehicle may be a new model, as appellant contends, in the matter of Item 13 of Exhibit A (Erlandson), or a vehicle not previously registered in California, as appellant contends, in the matter of Item 17 of Exhibit A (Huskey).

On this issue, appellant's DMV manager, Verla Markham's testimony that Item 17 was an out-of-state vehicle was discredited by respondent's documentary evidence (Exhibit 22) which established with abundant certainty that the vehicle described in Item 17 was registered in this state at the time appellant sold it to Huskey. The master file reference copy of the certificate of ownership, which is a part of respondent's Exhibit 22, clearly shows that the vehicle had been originally registered in California to the Bank of America, 300 Montgomery Street, San Francisco, and

passed through several dealers licensed by the State of California before it reached appellant.

Inspecting Exhibit 22 further, we note that the amount of the overcharge in this instance was $24. Assuming an honest mistake, the dealer had two and a half months in which to discover the overcharge from its books and make the appropriate voluntary refund to the buyer, but the refund was not made until the buyer requested it. Indeed, appellant admits that the buyer's account was not credited with the overcharge. We view with much concern a situation such as we have before us; an overcharge of registration fees in a substantial amount, a refund of the excess two and a half months later and only upon the request from the lawful owner of the funds, and the appellant attempting to exculpate itself by erroneously claiming (1) it had to estimate the fees because (2) the car was not registered in California, the initial assertion being contrary to law and the alleged facts, clearly controverted by the evidence.

Appellant's accounting practices were far from being fool-proof, although it urged respondent and this Board to believe otherwise. Appellant does not inform us why it did not make a refund, or at the very least, credit the buyer's account, when the "bundle sheet" was returned from DMV. The testimony of appellant's DMV manager was that the "bundle sheet" was returned showing $34 as the correct amount and she indicates that the refund could have been made ". . . before the list was sent in . . ." Where the $24 might be today, in the event the buyer had not compared the figures on the titling documents with those on the conditional sale contract, is hardly a matter of conjecture.

We also view with much concern the fact that, for appellant's 1968 fiscal year, $16,507.03, representing excess charges for registration fees, was credited to Account 83, a tax and license account which was a part of appellant's bookkeeping system and the fact that appellant did not show that these monies had been refunded or even credited to the accounts of the customers to whom it belonged. The facts surrounding the $16,507.03 were established through appellant's witnesses. Notwithstanding the testimony of these witnesses that the accounting system was designed to preclude failure to refund excess registration fees, 9 instances were proven wherein refunds were not made until sometime after August 18, 1968, the date respondent commenced the audit of appellant; 8 of the 9 were not made until after February 2, 1969, the date the Accusation in this case was filed.

Although the evidence produced by appellant showed that $16,507.03 was credited to Account 83 for the 1968 fiscal year, this figure would not reflect the true amount representing overcharges for registration fees for that year. According to appellant, that money came from two sources; excessive registration fees charged customers but discovered by appellant's DMV Section and excessive registration fees charged customers which had been submitted to respondent but returned to the appellant as overcharges to be refunded the appropriate persons. If on a given "bundle sheet" there were both undercharges and overcharges, the evidence showed that respondent offset them to determine the net amount due from or to the dealer. If overcharges exceeded undercharges, only the amount of the "net" overcharge on that bundle would be refunded to appellant and credited to Account 83. This was all

well and good as between the respondent and appellant, but it did not take into consideration, and was not intended to take into consideration, the rights of appellant's individual customers who were overcharged by appellant. For example, if in a bundle, ten buyers were undercharged $10 each and eleven were overcharged $10 each, the department would refund only $10 to appellant, which would result in only $10 being credited (as part of the $16,507.03) to Account 83, although appellant became aware on receipt of the bundle that it owed eleven of its customers the total sum of $110.

Appellant failed to show at the administrative hearing that it made the appropriate refunds with respect to the credit figure $16,507.03 in Account 83, but elected to rely upon the integrity of its accounting system. It was given abundant opportunity to dispel any inference that it had not made proper refunds, an inference raised by its own evidence. The hearing officer made it clear on several occasions that appellant had not satisfactorily shown refunds of the overcharges which necessarily resulted in the amount credited to Account 83, and that he desired documentation to this effect. For example, the following dialogue took place between counsel for appellant and the hearing officer at R.T. 834, lines 11 through 22:

> "MR. LINDER: It is with reference to some overcharges, and those are the matters that are in issue. We have been attempting to show matters in mitigation; and I know of no law that requires the handling of these moneys to be in certain—I would say, there is some sort of a fiduciary capacity, but not that they have to be treated as a

separate account, or separate trust funds, as long as they are accounted for.

"HEARING OFFICER: And that is what I don't understand; how they have been accounted for. That's what I have been trying to find out, how the money has been accounted for. I haven't said it had to be a special bank account. I only want to be shown on the books how this money is accounted for."

Appellant's attempt to produce the evidence was woefully inadequate. It did offer into evidence 237 vouchers, received as Exhibit L, which established that refunds were made by appellant to 237 persons from September 23, 1968, to December 30, 1968, for a total of $1,343. It is significant that all refunds reflected by these vouchers were made after August 18, 1968, the date the respondent started the audit. It is also significant the amount shown as refunded is small, when compared to the "net" credit to appellant for 1968 of $16,507.03. If, as appellant contends, it makes all appropriate refunds, it should have had no difficulty proving that it refunded at least that amount in the same manner as it proved the 237 refunds or by some other acceptable documentation.

Appellant produced no documentary proof whatever of refunds during the period prior to the audit date. Appellant did prove, however, that even after the audit, refunds were made over a period of approximately three months for 237 separate overcharges. Appellant did not reveal when the overcharges were made which occasioned these refunds.

We share the concern expressed by the hearing officer that appellant treated moneys of a fiduciary nature

in such a way that strict accounting for the funds could not be made. We affirm the respondent's finding that appellant violated Section 11713(h) (now g) V.C. as to those vehicles described as Items 4, 6, 7, 12 through 17 in Exhibit A, attached to the Accusation.

V. DOES THAT PORTION OF THE PENALTY THAT PERMITS THE DIRECTOR OF MOTOR VEHICLES TO VACATE HIS STAY ORDERS AND IMPOSE THE SUSPENSION OR REVOCATION UPON RELIABLE EVIDENCE AND WITHOUT GIVING APPELLANT NOTICE AND OPPORTUNITY TO BE HEARD PRIOR TO TAKING SUCH ACTION VIOLATE DUE PROCESS OF LAW?

This Board has reviewed this question on three previous occasions and answered it in the negative. Reference is made to Ralph's Chrysler-Plymouth vs. Department of Motor Vehicles supra, commencing at page 11, for our most recent discussion. We conclude that the conditions of probation imposed in the case before us do not invade appellant's constitutional rights.

VI. WAS AN IMPARTIAL ADMINISTRATIVE HEARING PRECLUDED DUE TO AFFIDAVITS BEING ALLOWED INTO EVIDENCE CONTAINING IRRELEVANT MATERIAL?

Appellant raised this issue in its Opening Brief, without argument or citation of authority, and did not urge the point during oral argument. The same issue was before this Board in the case of Holiday Ford v. Department of Motor Vehicles A-1-69 and is discussed in the Board's Final Order commencing at page 13. We concluded in that case that the appellant had

failed to properly pursue the matter at the administrative hearing by electing not to make appropriate objections or motions to strike.

We dispose of the issue in this case on the same grounds. The record is devoid of any indication that appellant made the proper objections or motions at the administrative hearing.

VII. WHAT PENALTY IS APPROPRIATE TO THE FINDINGS OF THE DIRECTOR AS MODIFIED BY THIS BOARD?

We have, on a number of occasions, reviewed in some detail the power vested in this Board to review and re-determine the penalty imposed by respondent. Our most recent discussion is contained at page 13, Ralph's Chrysler-Plymouth, supra. We concluded that Section 3055 V.C. authorizes us to refix penalty following reversal of one or more of the findings of the respondent and that Section 3054(f) V.C. authorizes us to refix penalty where we do not disturb the findings, but believe the penalty not to be commensurate with such findings.

Pursuant to Section 3054(f) and 3055 V.C., the New Car Dealers Policy and Appeals Board amends the decision of the Director of Motor Vehicles as folllows:

Determination of issues:

I. No cause for disciplinary action has been established under the provisions of Sections 2981(f) and 2982(a) of the Civil Code.

II. No cause for disciplinary action has been established under Section 11713(a) Vehicle Code, Section 5753 Vehicle Code and the Finding of Fact IX of the Decision of the Director of Motor Vehicles

(reporting a date of sale other than the true date of sale.)

III. Cause for disciplinary action has been established under the provisions of Section 4456 Vehicle Code.

IV. Cause for disciplinary action has been established under the provisions of Section 11713(h), (now g) of the Vehicle Code.

WHEREFORE THE FOLLOWING ORDER is hereby made:

1. The dealer's license, certificate and special plates D-1758 heretofore issued to Ralph Williams Ford, hereinafter referred to as as "appellant", a California Corporation, are hereby revoked; provided, however, that the execution of the order of revocation is hereby stayed for a period of three (3) years from the effective date of this decision, during which time appellant shall be placed on probation to the Director of Motor Vehicles of the State of California upon the following terms and conditions:

(a) That for a period of ten (10) days, appellant shall not exercise any of the rights or privileges granted by its license, certificate and special plates D-1758.

(b) Appellant shall obey all of the laws of the United States, the State of California and its political subdivisions, and the rules and regulations of the Department of Motor Vehicles of the State of California governing the exercise of its privileges as a licensee.

(c) Appellant shall forthwith install, if it has not already done so, adequate accounting procedures, together with appropriate accounting controls, that

will reflect the receipt and disbursements of all money received as deposits for the payment of registration and license fees to the State of California. Said accounting procedures shall include, but not be limited to, records that will show the name of the person depositing the money, the amount of money so deposited, the amount of money paid to the Department of Motor Vehicles on behalf of the persons so depositing such money, the refund of any excess money to such person, and the dates on which each of said events occurred. Appellant shall further file, during the probationary period herein fixed, with the Director of Motor Vehicles at his office in Sacramento, California, a quarterly affidavit, executed under the penalty of perjury, by a responsible officer or a certified public accountant of appellant, attesting to the fact of appellant's compliance with this term and condition of probation and noting specifically in said affidavit any exception to the full compliance with this term and condition of probation. Said affidavit shall be filed no later than the 15th working day after the close of the quarterly period of time. The first affidavit shall be filed at the expiration of the first quarter immediately following the effective date of this decision. Said accounting procedures shall be available for inspection, including the right to make copies thereof, to authorized representatives of the Department of Motor Vehicles at appellant's place of business, during normal office hours of the appellant's business office, excluding Saturdays, Sundays and legal holidays.

2. Should the Director of Motor Vehicles at any time during the existence of said probationary period determine upon reliable evidence that appellant has violated any of the terms and conditions of probation, he may, in his discretion and without a hearing, revoke said probation and order the revocation of appellant's license, certificate and special plates D-1758 as hereinabove set forth; otherwise, upon full compliance by appellant with all of the terms and conditions of probation set forth and upon the expiration of the term of probation, the stay of said Revocation shall become permanent.

This Final Order shall become effective when served upon the parties. The ten (10) day period ordered under paragraph 1, subparagraph (a) of this order shall commence on the fourteenth day following the effective date of this order, or on such earlier date as may be fixed by the Director of Motor Vehicles.

WARREN BIGGS, President
AUDREY B. JONES, Vice President
GILBERT D. ASHCOM
RALPH L. INGLIS
MELECIO H. JACABAN
ROBERT B. KUTZ
ROBERT D. NESEN
WINFIELD J. TUTTLE

APPENDIX H.

Findings of Fact and Conclusions of Law.

Superior Court of the State of California, for the County of Los Angeles.

Ralph Williams Ford, a California corporation, Petitioner, v. New Car Dealers Policy and Appeals Board and Department of Motor Vehicles, Respondents. No. 979 623.

The above-entitled matter, having come regularly on for hearing in Department 59 of the above-entitled Court, on the 3rd day of February, 1971, before the Honorable CHARLES H. CHURCH, Judge presiding, Petitioner appearing by its counsel, LINDER, SCHURMER, DRANE & BULLIS and ELLIS J. HORVITZ, and Respondents appearing by their counsel, EVELLE J. YOUNGER, Attorney General of the State of California, by Deputy Attorney General, MARK LEICESTER, and the entire record of the administrative proceedings which are the subject matter of the within action having been received in evidence and read by the Court, and the Court having read all of the papers on file in the action, and having taken judicial notice of certain documents and other Court files, as requested, and the matter having been orally argued and submitted, and the Court being fully informed in the premises, the court now makes the following:

FINDINGS OF FACT

I

Petitioner, RALPH WILLIAMS FORD, is a California corporation, and at all times relevant to these proceedings has been and now is a new and used car dealer under license issued by the Department of Mo-

tor Vehicles, and has engaged, and now is engaging in the business of selling new and used automobiles in the City of Encino, at 15770 Ventura Boulevard, County of Los Angeles, State of California. The number of Petitioner's license, certificate and special plates is D-1758.

II

At all times herein mentioned, Respondent NEW CAR DEALERS' POLICY & APPEALS BOARD (hereinafter referred to as "THE BOARD"), has been and now is an appellate board charged with the responsibility to hear as an appellate body, appeals from decisions of the DEPARTMENT OF MOTOR VEHICLES, all in accordance with the provisions of and under the authority contained within Chapter V, Division 2, Vehicle Code Section 3000 et seq. This Board is composed of nine (9) members. The presiding officer is WARREN BIGGS, President of the Board, and the Executive Secretary of the Board is HARRY TOWNE.

III

At all times mentioned herein Respondent, DEPARTMENT OF MOTOR VEHICLES (hereinafter referred to as "THE DEPARTMENT"), has been and now is the agency charged with administering the provisions of the Vehicle Code relating to said agency. The Director of the DEPARTMENT OF MOTOR VEHICLES is ROBERT C. COZENS.

IV

An Accusation was filed by the Department against Petitioner on February 21, 1969, a copy of which is on file herein as Exhibit "D" to the Petition. An administrative hearing was held on May 27, 28, 29, June

18, 19, 20, 23, July 29, 30, 31, 1969. Subsequent thereto, a Decision was rendered by the Hearing Officer, adopted by the Department of Motor Vehicles and filed by the Department of Motor Vehicles on September 29, 1969. A copy of said Decision is on file as Exhibit "A" to the Petition. Petitioner appealed to the Board from portions of said Decision as reflected in the "Appeal and Notice of Appeal", filed herein as Exhibit "B" to the petition. The appeal to the New Car Dealers' Policy & Appeals Board was heard on May 20, 1970, before said Board. The "Final Order" of the Board was filed and served on June 11, 1970. A copy of said Final Order is on file herein as Exhibit "C" to the Petition.

V

The Board in its Final Order reversed the Department's Decision wherein the Department had held Petitioner guilty of two (2) separate charges of violations of the Rees-Levering Act [Civil Code §2982(a)], reversed the Department's Decision wherein the Department held that Petitioner had violated Vehicle Code §5753, reversed the Department's Decision wherein the Department had found the Petitioner had fraudulently reported wrong dates of sale to the Department, and reversed the finding that Petitioner violated Vehicle Code §4456 with respect to item #4 in Exhibit "A" to the Accusation.

VI

The final order of the respondent New Car Dealers Policy and Appeals Board imposed a penalty as follows:

"WHEREFORE THE FOLLOWING ORDER is hereby made:

"1. The dealer's license, certificate and special plates D-1758 heretofore issued to Ralph Williams Ford, hereinafter referred to as 'appellant', a California Corporation, are hereby revoked; provided, however, that the execution of the order of revocation is hereby stayed for a period of three (3) years from the effective date of this decision, during which time appellant shall be placed on probation to the Director of Motor Vehicles of the State of California upon the following terms and conditions:

"(a) That for a period of ten (10) days appellant shall not exercise any of the rights or privileges granted by its license, certificate and special plates D-1758.

"(b) Appellant shall obey all of the laws of the United States, the State of California and its political subdivisions, and the rules and regulations of the Department of Motor Vehicles of the State of California governing the exercise of its privileges as a license.

"(c) Appellant shall forthwith install, if it has not already done so, adequate accounting procedures, together with appropriate accounting controls, that will reflect the receipt and disbursements of all money received and deposits for the payment of registration and license fees to the State of California. Said accounting procedures shall include, but not be limited to, records that will show the name of the person depositing the money, the amount of money so deposited, the amount of money paid to the Department of Motor Vehicles on behalf of the

persons so depositing such money, the refund of any excess money to such person, and the dates on which each of said events occurred. Appellant shall further file, during the probationary period herein fixed, with the Director of Motor Vehicles at his office in Sacramento, California, a quarterly affidavit, executed under the penalty of perjury, by a responsible officer or a certified public accountant of appellant, attesting to the fact of appellant's compliance with this term and condition of probation and noting specifically in said affidavit any exception to the full compliance with this term and condition of probation. Said affidavit shall be filed no later than the 15th working day after the close of the quarterly period of time. The first affidavit shall be filed at the expiration of the first quarter immediately following the effective date of this decision. Said accounting procedures shall be available for inspection, including the right to make copies thereof, to authorized representatives of the Department of Motor Vehicles at appellant's place of business, during normal office hours of the appellant's business office, excluding Saturdays, Sundays and legal holidays.

"2. Should the Director of Motor Vehicles at any time during the existence of said probationary period determine upon reliable evidence that appellant hs violated any of the terms and conditions of probation, he may, in his discretion and without a hearing, revoke said probation and order the revocation of appellant's license, certificate and special plates D-1758 as hereinabove set

forth; otherwise, upon full compliance by appellant with all of the terms and conditions of probation set forth and upon the expiration of the term of probation, the stay of said Revocation shall become permanent."

VII

Petitioner violated Vehicle Code §4456 with respect to items #1, 2 and 3 in Exhibit "A" to the Accusation herein.

VIII

Finding of Fact VIII of the Department's Decision is supported by the evidence and is adopted by the Court as its Finding, to wit:

"A" "Respondent wrongfully and unlawfully used dealer's reports of sale in that respondent failed to mail or deliver the reports of sale of used vehicles, together with other documents and fees required to transfer the registration of the vehicles described as Items 1 through 3 of Exhibit "A" attached to the Accusation and made a part hereof by reference."

IX

Finding of Fact XI, 2, of the Department's Decision is supported by the evidence and is adopted by the Court as its Finding, to wit:

"2. The delays occurring in the filing of The titling documents and payment of the registration were caused by factors, such as (1) failure of the selling dealer to turn over the titling documents promptly after respondent had purchased a vehicle; (2) failure of the legal owner such as a finance agency to release the titling documents;

(3) failure of an individual owner to turn over to respondent the titling documents on the trade-in vehicle; (4) the necessity to secure a duplicate pink certificate when the owner had lost or misplaced the original pink certificate; (5) on out-of-state vehicles the necessity of securing from the various owners in the non-title states, bills of sale to the vehicles from the prior owners, and (6) on very rare occasions due to volume of paper work in respondent's office, the titling documents were misplaced. The Department of Motor Vehicles Section of respondent followed a system that upon the receipt of information relative to the purchase of trade-in of a vehicle without complete titling documents, a follow-up was immediately started such as contacting the selling dealer, the individual seller, the prior financing agency, the Department to ascertain the names of the registered and legal owners, the out-of-sale owners of any other sources in order to secure the documents. A current file, which was reviewed daily by the head of the Department of Motor Vehicles Section, was kept and after the 15th day following the sale of a vehicle, increased efforts were made to secure any of the missing titling documents. Should the titling documents be not delivered to the Department of Motor Vehicles within the statutory time allowed, respondent would pay the misuse fee."

"3(a). Respondent used its own registration and license estimated fees primarily on those vehicles where the classification information was not immediately available, examples of this being (1) where the pink certificate was not in possession of respondent so that the classifications could be

obtained on which the fees could be calculated, and (2) vehicles that had not been previously registered in California and the amount of the fee was determined by the Department based on the selling price of such vehicle."

With respect to the three (3) instances which were found by Respondents to be violations of §4456 of the Vehicle Code, Petitioner, after having sold said vehicles, made reasonable efforts to obtain the titling documents necessary to make reports of sale.

X

Petitioner sold approximately 6,200 vehicles in the last half of 1968.

XI

"Respondent included as an added cost to the selling price of the vehicles, hereinafter described, in Exhibit A, attached to the Accusation and incorporated herein by reference, additional registration fees as listed below in excess of the fees due and paid to the State:

Items	Fees Due Department	Fees Charged Purchaser	Excess
12	$ 3.00	$40.00	$37.00
4	$48.00	$50.00	$ 2.00
6	$34.00	$35.00	$ 1.00
13	$47.00	$70.00	$23.00
14	$40.00	$42.00	$ 2.00
7	$42.00	$45.00	$ 3.00
15	$34.00	$40.00	$ 6.00
16	$33.00	$38.00	$ 5.00
17	$36.00	$60.00	$24.00

XII

Although a formula for calculating the amount of license fees payable is provided by Revenue and Taxation Code §10751, the computation of the exact amount of such fees remains a problem common throughout the industry.

XIII

Findings XI, 3(b) through (g) concern matters not charged in the Accusation, and the implied finding that there was a $16,570.03 credit balance from overcharged fees that had not been refunded or credited to the accounts of customers to whom they belonged, is not within the scope of any charge alleged in the Accusation. The Findings of the Board hereinabove set forth in Finding XI, 3(b) through (g) were improperly considered by the Board in determining the nature and extent of the penalty assessed in the Final Order of the Board.

XIV

The penalty assessed by the Department was not determined solely upon charges alleged in the Accusation.

XV

The penalty assessed by the Board was not determined solely upon charges alleged in the Accusation.

CONCLUSIONS OF LAW

I

No disciplinary action can be taken and no penalty rendered against Petitioner other than the $3.00 penalty fee provided for within the statute for each of Petitioner's three (3) violations of Vehicle Code §4456.

II

Petitioner was denied due process of law and a fair hearing in that the penalty imposed was based upon matters outside the scope of the accusation, i.e., paragraphs (f) and (g) of Finding XI, relating to petitioner's accounting procedures with respect to overcharge of registration fees, and the implied Finding that the same were not refunded to the customers to whom they belonged.

III

Petitioner was denied due process of law and a fair hearing by reason of the imposition of that portion of the penalty which provides that if the Director of Motor Vehicles determines, upon reliable evidence, that any of the terms and conditions of probation have been violated, he may, in his discretion and without a hearing, revoke probation and order suspension or revocation of petitioner's license, certificate and special plates. A revocation without a hearing wherein petitioner is afforded the opportunity to defend against the charges based upon the Director's "reliable evidence" is violative of the fundamental principle of due process.

IV

A judgment should be entered herein providing that the Petition for Writ of Mandamus is granted and the Court will order a Peremptory Writ of Mandamus to issue, remanding the proceedings to the Board to reconsider its action in light of the Court's Findings above.

Date: June 25, 1971.

/s/ Charles H. Church
CHARLES H. CHURCH, Judge
The Superior Court

APPENDIX I.

Judgment Granting Peremptory Writ of Mandamus.

Superior Court of the State of California, for the County of Los Angeles.

Ralph Williams Ford, a California corporation, Petitioner, vs. New Car Dealers' Policy & Appeals Board and Department of Motor Vehicles, Respondents. No. 979 623.

This matter came on regularly before this Court on February 3, 1971, for hearing, LINDER, SCHURMER, DRANE & BULLIS and ELLIS J. HORVITZ appearing as attorneys for Petitioner and MARK LEICESTER, Deputy Attorney General, appearing as attorney for Respondent. The record of the administrative proceedings and exhibits thereto having been received into evidence and examined by the Court and judicial notice having been taken of certain documents, arguments having been presented, the matter having been submitted for decision, and the Court having made Findings of Fact and Conclusions of Law, which have been signed and filed,

IT IS ORDERED that:

1. A Peremptory Writ of Mandamus shall issue from this Court remanding the proceedings to Respondent and commanding Respondent to set aside its Decision and Final Order dated June 11, 1970, in the administrative proceeding entitled "In the matter of RALPH WILLIAMS FORD, a California corporation, Appellant, vs. DEPARTMENT OF MOTOR VE-

HICLES, Respondent.", case number A-5-69, and to reconsider its action in light of this Court's Findings of Fact and Conclusions of Law and to take further action in this matter in accordance therewith.

2. Petitioner shall recover its costs in this action in the amount of $.....

DATED: July 15, 1971.

/s/ Charles H. Church
CHARLES H. CHURCH
JUDGE OF THE SUPERIOR COURT

SUPREME COURT, U. S.
FILED
SEP 21 1973
JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-55

RALPH WILLIAMS FORD, a California corporation,
Petitioner,

vs.

CALIFORNIA DEPARTMENT OF MOTOR VEHICLES, *et al.*,
Respondents.

Response to Petition for Writ of Certiorari

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-55

RALPH WILLIAMS FORD, a California corporation,
Petitioner,

vs.

CALIFORNIA DEARTMENT OF MOTOR VEHICLES, *et al.*,
Respondents.

Response to Petition for Writ of Certiorari

Opinion Below

Petitioner seeks a writ of certiorari directed to the Court of Appeal of the State of California to review its judgment and opinion filed February 9, 1973, and numbered 2d Civil No. 40265, which opinion appears at 30 Cal. App. 3d 494 and 106 Cal. Rptr. 340. The opinion is attached to the Petition as Appendix A.

Jurisdiction

The Petition asks review of a final judgment of the highest California court in which a decision could be had and alleges a violation of a right guaranteed by the United States Constitution. Jurisdiction is based on 28 U.S.C. § 1257(3).

Questions Presented

Petitioner, a new car dealer licensed by respondent Department of Motor Vehicles, contends that in an administrative disciplinary proceeding it was penalized for offenses which were neither charged nor proved by the licensing agency and that such administrative action violates the due process clause of the Fourteenth Amendment to the United States Constitution.

Respondents submit that administrative disciplinary action taken against a licensee on the basis of uncharged and unproved offenses would violate due process, but that this is not what occurred in the present case. Disciplinary action was taken for violations of the licensing law charged and proved by the agency. Petitioner introduced evidence at the hearing which enhanced rather than mitigated its culpability. This evidence was considered by the agency in determining the nature of the penalty to be imposed and resulted in the imposition of a severe penalty. Respondents contend that such action does not violate due process.

Constitutional and Statutory Provisions Involved

The constitutional provision involved is the due process clause of the Fourteenth Amendment to the United States Constitution. The statutes involved are sections 4456 and 11713(g) of the California Vehicle Code, copies of which are attached to the Petition as Appendices C and D, respectively.

Statement of the Case

An accusation (Petn., Appendix E) was filed against petitioner by respondent Department of Motor Vehicles in which petitioner was charged, *inter alia*,[1] with four violations of section 4456 of the California Vehicle Code, failure to timely submit to the Department reports of sale of used vehicles and other documents and fees required to transfer the registration, and with nine violations of section 11713(g) of the California Vehicle Code, including as an added cost to the selling price of a vehicle an amount for licensing or transfer of title which is not owed to the state. A hearing was held before a hearing officer of the Office of Administration Hearings of the State of California. Thereafter, the Department rendered a decision (Petn., Appendix F) in which it found that petitioner had committed three of the four charged violations of section 4456 of the Vehicle Code and all nine of the charged violations of section 11713(g) of the Vehicle Code. The Department ordered petitioner's license revoked, which revocation was stayed for a period of three years during which petitioner was placed on probation and its license suspended for ten days.

Petitioner appealed the Department's decision to respondent California New Car Dealers Policy and Appeals Board. The Board issued its final order (Petn., Appendix G) reversing the Department's decision in

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[1]The other charges were subsequently resolved favorably to petitioner and were not considered in the determination of the penalty.

part, but affirming the finding that petitioner was guilty of three violations of section 4456 of the Vehicle Code and nine violations of section 11713(g) of the Vehicle Code. The penalty imposed by the Board included revocation stayed on probation for three years and a ten-day suspension.

Petitioner filed a petition for a peremptory writ of mandate with the Superior Court of the State of California for the County of Los Angeles. The court confirmed the findings of the Department, as affirmed by the Board, regarding petitioner's three violations of section 4456 and nine violations of section 11713(g). It concluded, however, that petitioner had been denied due process because the penalty imposed was based on matters outside the scope of the accusation. Accordingly, judgment was entered granting the petition and ordering issuance of a peremptory writ of mandate. (See Petn., Appendices H and I.)

The Department and the Board appealed from this judgment to the Court of Appeal of the State of California, Second Appellate District. The Court of Appeal reversed the judgment of the superior court. In speaking to the superior court's error in concluding that petitioner was denied due process, the Court of Appeal stated:

> "In our view the superior court misconstrued the relationship between charges and findings in the administrative proceedings. The board did not find that Williams committed any violations other than those charged in the accusation. Williams produced evidence of its accounting procedures in an attempt to show it had not made the overcharges set forth in the accusation. In response to that evidence the board made findings which

showed that it did not credit the evidence produced by Williams to rebut proof of overcharges, and that Williams' accounting procedures were inadequate to disclose what refunds, if any, were routinely made to overcharged purchasers. The board's basic finding that on nine occasions the price of vehicles sold by Williams included as an added cost specified licensing or transfer fees not owed to the state (Veh. Code § 11713, subd. (g)) remained unaffected by additional findings on the subject of Williams' accounting procedures. These additional findings, however, were pertinent to questions of due care, penalty, and conditions of probation. Once the board found the charged violations had taken place, it was entitled to consider related deficiencies in order to evaluate the amount of due care exercised by Williams in past attempts to comply with the statute and in order to determine what administrative penalty and what conditions of probation would be suitable. (Mills v. State Bar, 6 Cal. 2d 565, 567 [58 P.2d 1273].) Evidence of other possible violations need not be disregarded by the board in arriving at an appropriate penalty and appropriate conditions of probation, merely because that evidence was produced by Williams."

Williams Ford v. New Car Dealers Policy etc. Bd., 30 Cal. App. 3d 494, 499-500, 106 Cal. Rptr. 340, 343 (1973); *see also* Petition, Appendix A, pp. 5-6.

A petition for rehearing submitted by petitioner was denied by the Court of Appeal, and the Supreme Court of California denied a petition for hearing. (Petn., Appendix B.)

Statement of Facts

The relevant facts in this matter concern the defense presented by petitioner to the nine violations of section 11713(g) of the Vehicle Code, which violations involved charging customers an amount for registration fees in excess of that due the state.[2] Petitioner introduced at the administrative hearing considerable evidence regarding its accounting procedures for the collection and payment of automobile registration fees in what became a futile attempt to show that the overcharges were refunded to its customers. The Department made findings, which in turn were adopted by the Board, based on the undisputed evidence offered by petitioner in defense. (Petn., Appendix F, pp. 7-9; Petn., Appendix G, pp. 16-18.) These findings are not questioned by petitioner. The key findings, with pertinent citations to the administrative transcript, are as follows:

> "XI 3(d). . . . [Petitioner] did not maintain any journals, subsidiary ledgers or any other type of accounting records wherein it could be ascertained the name of the purchaser, the amount of money deposited by said purchaser for payment to the Department, the actual amount of money required by the Department and the dates and amount of the refund of the overcharge to said purchaser. . . . [Adm. Tr. pp. 944, 1171; see also Adm. Tr. pp. 798-99, 807, 829, 844, 901, 930, 935-36, 940, 944-45, 952.]

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[2]Petitioner does not dispute the sufficiency of the evidence supporting the finding that he committed nine violations of section 11713(g).

"(e). . . . [Petitioner's] employees on the managerial level, including the certified public accountant auditor, knew that the deposits made by purchasers for the fees due the Department, were fiduciary moneys requiring the highest degree of accountability . . . [Adm. Tr. pp. 951, 1168-70.]

"(f). At the end of . . . [petitioner's] 1968 accounting period, the expense account to which . . . [petitioner] credited the refunds from the Department had a credit balance of $16,570.03 . . . [Adm. Tr. pp. 934-35, 948.]

"(g). With one exception, respondent did not refund the excess deposit fees to purchasers identified in Finding X hereof [those representing the nine charged violations of section 11713(g)] until subsequent to the filing of the Accusation. [Adm. Tr. p. 876; Adm. Exh. 6.]"

ARGUMENT

Evidence Presented by Petitioner Was Used to Determine the Extent of the Penalty and Not as a Separate Ground for Disciplinary Action

Petitioner contends that he was denied due process in that respondents took disciplinary action against his license by reason of matters which were neither charged nor proved. Petitioner was charged with and found guilty of three violations of section 4456 of the Vehicle Code and nine violations of section 11713(g) of the Vehicle Code. However, petitioner asserts that disciplinary action was not taken solely for these violations, but, in addition, for petitioner's failure to show that it had refunded to its customers overcharges for registration fees in excess of $16,000. Since the failure to refund the $16,000 in overcharges was not alleged in the accusation and not proved by the Department, petitioner contends that disciplinary action based on its failure to refund the overcharges constitutes a denial of due process. (Petn. pp. 12-17.)

The problem with petitioner's argument is that the decision of the Department and the final order of the Board indicate that disciplinary action was taken only for petitioner's three violations of section 4456 and nine violations of section 11713(g). The Department and the Board made findings based on the evidence offered by petitioner in defense, which findings were considered in determining the nature of the penalty assessed for the charged and proved violations and not as bases for additional disciplinary action.

At the administrative hearing and throughout all proceedings in this case, petitioner did not dispute the nine allegations of overcharging customers for registra-

tion fees in violation of section 11713(g). Instead, petitioner offered evidence of its accounting procedures in an attempt to mitigate its culpability by showing prompt refunding of the overcharges to its customers. The evidence failed to produce the result sought by petitioner. The evidence revealed that petitioner charged its customers estimated fees for vehicle registration, but maintained no accounting records wherein it could be ascertained the identity of the purchaser, the amount of money deposited by the purchaser for payment of the registration fee, the amount actually paid by petitioner to the Department for the registration fee, and the date and amount of the refund of the overcharge to the purchaser. Petitioner's evidence showed not only this, but that the account to which it credited refunds from the Department had a credit balance of $16,570.03, and that it had not refunded the overcharges to eight of the nine purchasers involved in the nine charged violations of section 11713(g) until after it had been served with the accusation. This evidence was inculpatory rather than exculpatory. It did not show that petitioner promptly refunded overcharges to its customers but provided the basis for an inference that petitioner regularly overcharged its customers for registration fees and made little or no effort to refund the overcharges.

The refusal of an administrative body to consider evidence introduced is arbitrary, and therefore improper, action. *S. D. Warren Company v. N.L.R.B.*, 342 F.2d 814, 816 (1st Cir. 1965), *cert. denied* 383 U.S. 958. Respondents considered the evidence offered by petitioner in connection with the matter to which it was pertinent, namely, the nature of the penalty. An administrative agency, because of its technical expert-

ise, is vested with a wide range of discretion in the imposition of penalties. *Nadiak v. C.A.B.*, 305 F.2d 588, 592 (5th Cir. 1962), *cert. denied* 372 U.S. 913. In exercising this discretion, respondents concluded that the evidence offered by petitioner, rather than mitigating its culpability, demonstrated a serious lack of due care in dealing with the fiduciary money for registration fees deposited with it by its purchasers and imposed a severe penalty for the nine charged and proved violations of section 11713(g). The imposition of a penalty consisting of revocation stayed on probation for three years and a ten-day suspension was a proper exercise of the agency's discretion under these circumstances. *See United Steelworkers of America v. N.L.R.B.*, 376 F.2d 770, 772 (D.C. Cir. 1967), *cert. denied* 389 U.S. 932.

Petitioner relies principally on *In re Ruffalo,* 390 U.S. 544 (1968). In that case various charges had been brought against attorney Ruffalo in a disbarment proceeding. Ruffalo presented evidence in his defense, after which an additional charge was brought against him based on the evidence he had offered. The additional charge was found to be true, and it constituted the sole basis for Ruffalo's disbarment from the federal bar. It was held that the addition of this new charge denied Ruffalo fair notice, thus depriving him of the process that he was due. *In re Ruffalo, supra* at 549-50. Petitioner attempts to fit this case into the *Ruffalo* mold. As in *Ruffalo,* petitioner offered evidence that was damaging to itself, but, unlike *Ruffalo,* that evidence was not used to support an additional charge against petitioner. In the present case petitioner was given fair notice of all the violations it was found to have committed. The evidence petitioner presented was

used only to determine the nature of the penalty imposed for those violations.

Respondents submit that petitioner was not denied due process of law. The evidence presented by petitioner was used, as it should have been, to determine the extent of the penalty and not as a separate and additional ground for disciplinary action.

Conclusion

For the foregoing reasons, respondents request that the petition for writ of certiorari be denied.

Respectfully submitted,

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Attorneys for Respondents.

SUPREME COURT, U. S
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RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-55

RALPH WILLIAMS FORD, a California corporation,

Petitioner,

vs.

CALIFORNIA DEPARTMENT OF MOTOR VEHICLES and CALIFORNIA NEW CAR DEALERS POLICY AND APPEALS BOARD,

Respondents.

Petitioner's Reply to Response to Petition for Writ of Certiorari.

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Petitioner's Reply to Response to Petition for Writ of Certiorari.

Correction of Factual Errors.

Petitioner wishes to correct certain errors appearing in Respondent's Response to Petition for Writ of Certiorari. These errors illustrate and highlight the basic violations of due process and denial of a fair hearing which have occurred in this case:

1. At pages 8-9, Respondent correctly acknowledges that Petitioner never disputed the nine allegations of overcharging customers for registration fees. These nine violations, totalling $103.00, were admitted and were never in dispute.[1] However, at page 9, Respondents go

[1]In the opinion of the California Court of Appeal it is stated: "Williams produced evidence of its accounting procedures in an attempt to show it had not made the overcharges set forth in the accusation." (See Appendix A-5.) *This is incorrect.*

on to state that evidence concerning refunding of overcharges and accounting records pertaining thereto were introduced *by Petitioner by way of mitigation.* This is incorrect, and this error goes to the core of the case for the reasons that matters concerning the refunding of and accounting for overcharges (a) were not within the scope of the Accusation and (b) admittedly furnished the basis for the severe penalty imposed.

In truth, the extraneous issue of refunding overcharges was first introduced by Respondent Department of Motor Vehicles in its case in chief, and the Hearing Officer thereafter demanded that Petitioner introduce further evidence on this topic. Petitioner was *forced* to produce evidence on its accounting procedures, over its objection, at the insistence of the Hearing Officer, who stated on the record his mistaken belief that allegations of failure to refund overcharges were contained in the Accusation.[2]

Thus, the issues of refunding overcharges and accounting for them were not invited by Petitioner; they were thrust upon Petitioner by Respondents and over Petitioner's objection.

2. At page 8, Respondents argue that disciplinary action was taken against Petitioner only for the three violations of §4456 and the nine violations of §11713 (g). Respondents then acknowledge, however, that matters outside the scope of the Accusation were considered in determining the nature of the penalty.

In order to place this issue in proper perspective, it should be observed that the three violations of §4456

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[2]See Petitioner's Statement of the Case, paragraph 2—Administrative Hearing—at pages 4-5 of the Petition for Writ of Certiorari.

and the nine violations of §11713(g) (which totalled $103.00) were de minimus, and that the severe penalty here imposed was based solely upon the "possible" and "potential" violations which were neither charged, proved, nor found to be true. This was repeatedly and unequivocally admitted by the Attorney General in the state court proceedings,[3] and analysis of other decisions by Respondent Appeals Board support this admission.[4]

---

[3]a. From Respondent Board's Memorandum of Points and Authorities in the California Superior Court:

> "The basis for the decision was the failure of petitioner to account for the substantial sums of fiduciary money which petitioner claimed that it was refunding." [C.T. p. 398, lines 27-30]; ". . . *since it is overwhelmingly clear that the penalty in this case is a result of the failure to account for overcharges,* in the event this Court wishes to find that the violations of section 4456 do not warrant a penalty, there is no need to remand the case for further consideration of penalty." [C.T. p. 416, line 29 to p. 417, line 2; emphasis added.]

b. From oral argument in the California Superior Court, May 5, 1971 hearing:

> ". . . appellant's failure to properly account for these overcharges was so severe that the penalty imposed was not an abuse of discretion." [p. 10, lines 11-15.]
>
> ". . . *they* [*the Board*] *determined the penalty based on the fact that the procedures for accounting those overcharges, including all others, was not done.* They [Petitioner] had no accounting procedures." [p. 29, lines 16-19; see also: p. 29, line 14 to p. 30, line 3; p. 37, line 28 to p. 39, line 14; emphasis added.]
>
> From February 3, 1971 hearing, see R.T. p. 26, lines 17-22; p. 30, lines 7-9; p. 32, lines 21-22; p. 33, lines 13-20.

[4]In the proceedings below, copies of other decisions by Respondent New Car Dealers Policy and Appeals Board were placed in the record for judicial notice pursuant to California Evidence Code §452. For example, in *Coberly Ford v. D.M.V.*, Appeal No. A-25-72, the licensee was found guilty of *3627* violations of §4456, *14* violations of §11713(g), and numerous other violations of a more serious nature, but the penalty imposed (20 days suspension, suspension stayed) was far lighter than that imposed here and involved *no interruption* of the licensee's business.

3. At page 9, Respondents state that Petitioner's evidence showed that the account to which it credited refunds from the Department "had a credit balance of $16,570.03, . . ." [thereby raising an inference that Petitioner had failed to refund overcharges in this amount]. This is not only outside the scope of the Accusation, it is factually incorrect.[5]

a. In fact, according to uncontroverted evidence, the account in question (Account No. 83) for the period in question showed a net *debit* or *loss* of $12,380.22, not a *credit* balance (A.T. p. 934, line 17 to p. 935, line 20, p. 937, lines 4-14).[6]

b. Still worse, Petitioner is to be punished not because the evidence shows that Petitioner *failed* to pay refunds of $16,570.03 [rather than $103.00 as charged and proven], but because Petitioner did not prove to Respondents' satisfaction that it *had* paid refunds concerning this $16,570.03 item. Respondent Board's decision so reflects [C.T. p. 55] and the Attorney General repeatedly admitted in the state court proceedings that there was neither proof nor finding that Petitioner was guilty of failing to refund overcharges. Rather, he acknowledged that the penalty was imposed because Petitioner had failed to meet its "burden of proving" that it was innocent of this uncharged accusation.[7]

---

[5]The trial court, whose factual findings are conclusive on appeal [*Board of Trustees v. Metzger* (1972) 8 Cal.3d 206, 211, 104 Cal.Rptr. 452, 502 P.2d 1172], found that this matter was outside the scope of the Accusation and therefore did not rule on the underlying factual error [C.T. p. 494, line 31 to p. 495, line 7].

[6]Moreover, Account No. 83 did not and was not intended to show whether refunds had been paid (A.T. p. 937, line 26 to p. 938, line 5; p. 944, lines 5-28). The only evidence on this point was that all refunds had in fact been paid (A.T. p. 536, line 12 to p. 538, line 2; p. 961, line 24 to p. 963, line 1).

[7]A summary of statements made by the Attorney General in state court proceedings is attached hereto as Appendix J.

c. Concluding on this point, we further note that, at the later hearing before Respondent Appeals Board, Petitioner offered documentary proof that all refunds had been paid, but this offer was rejected by the Board on the ground it should have been presented at the initial proceeding before the Hearing Officer [Transcript of Appeals Board Hearing, p. 71, line 4 to p. 72, line 20]. Thus, at the original administrative hearing, where Petitioner had no prior notice that the questions of accounting procedures and repayment of over $16,000.00 in overcharges would be in issue, Respondents found the evidence that Petitioner had repaid all overcharges to be unpersuasive. When Petitioner subsequently sought to introduce documentary proof at the Appeals Board level, it was rejected as coming too late. Thus, even under Respondents' erroneous ground rules, *i.e.*, that Petitioner had the burden of proving it was *not* guilty of this uncharged offense, Petitioner never had a fair chance to *disprove* this "potential" or "possible" offense.

In summary, the foregoing factual errors in Respondents' Response to Petition for Writ of Certiorari highlight the issues presented for consideration by this Court: The few minor offenses with which Petitioner was charged and found guilty were de minimus. The "possible" or "potential" offenses for which Respondents intend to punish Petitioner were neither *charged, proved, nor found to be true.* Nevertheless, Petitioner now faces severe punishment because Petitioner has failed to meet "the burden of proving" that it is innocent of allegations of misconduct with which it was never charged and of which it was never found guilty.

Surely, the procedures followed in this case fall below the minimum requirements of due process and should not be condoned or tolerated.

Respectfully submitted,

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APPENDIX J.

Admissions by the Attorney General That the Penalty Imposed Was Based Upon Uncharged and Unproven Allegations of Misconduct.

The Attorney General through Deputy Attorney General Leicester, repeatedly admitted that there was no proof that Petitioner was guilty of failing to refund overcharges. Rather, he acknowledged that the penalty was imposed because Petitioner had failed to meet its "burden of proving" that it was innocent of this uncharged accusation:

> "Now I would like to also emphasize just one point. *There was no finding that refunds were not made. All that the findings said was that they had not shown they are making refunds,* and that is very significant because they are the ones who are claiming mitigation after showing aggravating circumstances on their own. *So, we haven't proven or alleged or found that they were failing to make refunds, essentially, supposedly a different violation.* That is not the case." [Emphasis added; February 3, 1971 hearing, R.T. p. 28, lines 11-19.]
>
> "At least that's the way I view the record in this case, and I also view the case in the light that *the Department felt it was the duty of the respondent here to prove that in every event they had made such refunds,* and having failed to do so, in view of the fact that they felt that there was at least $16,000 of unaccounted-for funds that belonged to the purchasers of these automobiles, he was entitled to a very stiff penalty.
>
> "Now, that's exactly the way I viewed the record in this case.

"MR. LEICESTER: Well, I would substantially agree with what your Honor said, with one exception: *I don't think the Department found that the dealer did in fact not refund the money. I think what the Department found was that there was no way you could tell.*

"THE COURT: That's right.

"MR. LEICESTER: And I think that's significant, though, because if they had gone out and said, 'Lookee here, it's perfectly clear beyond a doubt they didn't refund this money; they walked away with $16,000,' they're committing grand theft.

"Now, it may very well be that the dealer has in fact refunded a substantial amount of this money. It may very well be, and, of course, that's what the dealer was contending. But, you know, business regulation requires some evidence. You can't just take the licensee's word for it. If we did, we wouldn't have any business registration." [Emphasis added; May 5, 1971 hearing, R.T. p. 37, line 28 to p. 38, line 24.]

"MR. LEICESTER: So its your viewpoint, in other words, that the Board felt that Ralph Williams had—

"THE COURT: Had the burden of going forward to proving them, and they didn't meet that burden.

"MR. LEICESTER: We will agree with that, too. *He does have the burden of proving it.* But there is a difference between—

"MR. HORVITZ: We do have the burden of proving it?

"MR. LEICESTER: I think that is a matter of evidence. The burden shifted. You raised such a doubt that at this point the conclusion is that—Well, let's put it this way: Assuming this can be taken into consideration in determiniing penalty now, having overcharged the monies, I think it's incumbent upon the person who has the money to show what he did with it.

"MR. HORVITZ: You mean it is incumbent on us to disprove a serious accusation with which we were never charged?

"MR. LEICESTER: Well, you can describe it any way you want." [May 5, 1971 hearing, R.T. p. 43, line 27 to p. 44, line 16; see generally, p. 43, line 19 to p. 45, line 3; emphasis added.]

3. Finally, the Attorney General candidly admitted that the proceeding was characterized by a lack of concern for the requirements of due process:

"And this may be improper to consider in the case of due process of trial, but I think the Board had in mind it was the responsibility of the dealer to show what it did with the money." [May 5, 1971 hearing, R.T. p. 44, lines 22-25; see also February 3, 1971 hearing, R.T. p. 30, lines 14-17; emphasis added.]